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Integrating Title 18 War Crimes into Title 10:
A Proposal to Amend the Uniform Code of Military Justice

By

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**THE VIEWS EXPRESSED IN THIS ARTICLE ARE
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UNITED STATES AIR FORCE, DEPARTMENT OF
DEFENSE, OR THE U.S. GOVERNMENT.**

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During a house-to-house sweep in search of unauthorized weapons in the summer of 2003, U.S. soldiers enter the home of an Iraqi man. The man is brought outside and ordered to kneel on the ground. His hands are tied with plastic handcuffs. Inside, other soldiers others search the house. After finding an AK-47 rifle, the squad leader takes the rifle and orders the man to be brought inside. One soldier cuts the plastic handcuffs and leaves the room. The squad leader lays the rifle near the man, and says aloud to his fellow soldiers, "I feel threatened." He then fires two shots, killing the man.¹

Is this murder or a war crime?

An Iraqi prisoner in the custody of Navy SEALs is hung "Palestinian style" with his hands cuffed behind his back and hung suspended from his wrists. He is beaten by several men during a series of interviews and interrogations. An army sergeant is called in to help move the uncooperative prisoner, and when the unconscious man is lowered off of his wrists, blood flows out of his mouth. His death is later ruled as a homicide.²

Is this assault, torture, or a war crime?

I. INTRODUCTION

Following reports of detainee abuse coming out of Iraq and Afghanistan, some U.S. military members have been tried and convicted under the Uniform Code of Military Justice (UCMJ)³ for their involvement. Despite the international and war-related character of these offenses, so far the allegations have been charged as common crimes under Title 10 (aggravated assault, dereliction of duty, maltreatment of detainees, murder) even though conduct of members of the U.S. armed forces that constitutes a "grave breach" of the Geneva Conventions can be prosecuted in U.S. civilian courts under Title 18.

¹ This paragraph describes a scenario from Sadr City, Iraq, as reported by Edmund Sanders, *Troops' Murder Cases in Iraq Detailed*, L.A. TIMES, Dec. 7, 2004, at A1, and Karl Vick, *Two Days in August Haunt Charlie Company*, WASH. POST, Dec. 14, 2004, at A1.

² See Conor O'Clery, *New Prisoner Abuse Claims*, IRISH TIMES, Feb. 19, 2005, at 11; R. Jeffrey Smith, *Army Files Cite Abuse of Afghans: Special Forces Unit Prompted Senior Officers' Complaints*, WASH. POST, Feb. 18, 2005, at A16.

³ 10 U.S.C. §§ 801-946 (LEXIS through May 5, 2005).

The War Crimes Act⁴ of 1996 sought to implement the Geneva Conventions⁵ by criminalizing grave breaches of the Conventions and violations other laws of war and bringing these crimes into the federal criminal code. This Act expanded federal criminal jurisdiction over U.S. military members by providing the United States jurisdiction to try War Crimes Act violations in federal district court.

As part of federal statutory law, the War Crimes Act may be incorporated and charged under the UCMJ. Article 134 of the UCMJ, the “general article,” allows the military to import non-capital federal criminal statutes and charge them in a military court-martial. This broadens the subject matter of criminal offenses available to a court-martial. Not only are the punitive articles of the UCMJ⁶ available to the military prosecutor, any federal criminal statute that applies where the crime was committed could also be charged under the general article. This provision would generally allow military authorities to incorporate the War Crimes Act into military prosecutions and charge U.S. service members with certain war crimes.

While the UCMJ has the flexibility to import federal law into trials by courts-martial, it has its limits. Courts have interpreted the language of the general article to bar importation

⁴ 18 U.S.C. § 2441 (LEXIS through May 5, 2005).

⁵ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁶ Articles 77-134 are considered the punitive articles. The first six articles describe and define the criminal responsibility theory regarding principals (Article 77, 10 U.S.C. § 877), accessories after the fact (Article 78, 10 U.S.C. § 878), lesser included offenses (Article 79, 10 U.S.C. § 879), attempts (Article 80, 10 U.S.C. § 880), conspiracy (Article 81, 10 U.S.C. § 881), and solicitation (Article 82, 10 U.S.C. § 882). Articles 83 through 132 of the UCMJ contain crimes defined by Congress. Article 133 is a type of general article that applies only to officers and sets forth the elements for conduct unbecoming an officer. Article 134 contains the elements of proof required under the general article as well as more than fifty specific Article 134 offenses defined by the President.

of federal capital crimes into UCMJ proceedings. Where federal civilian courts have jurisdiction over criminal offenses that authorize the death penalty, these federal crimes may not be brought before a court-martial under Article 134. For example, the most serious crimes under the War Crimes Act—those in which the victim dies as a result of the defendant's conduct—trigger the authorization of the death penalty under the federal criminal statute. Therefore, such crimes cannot be charged as war crimes in a trial by court-martial. Still, military prosecutors may charge the underlying conduct as a violation of another punitive article, as has been the practice for more than one hundred years.

This has created a lopsided result. The Department of Defense is normally the agency that prosecutes members of the United States armed forces. Federal criminal law allows for punishment of certain war crimes, yet, the federal law may not be utilized in military prosecutions to the same extent as in federal civilian courts. The effect of this limitation is that courts-martial must continue to largely rely on the offenses defined by Title 10 when charging crimes that occur during an armed conflict. As a result, the most egregious crimes under the laws of war committed by U.S. military members are charged as common crimes under the UCMJ. For example, the intentional, fatal shooting of a person protected by the Geneva Conventions will likely be charged as murder under Article 118, and torture will likely be charged as an assault under Article 128. Compared to federal prosecutions, offenses tried by courts-martial will often carry lower maximum penalties.⁷

⁷ Although other sanctions, such as loss of rank, loss of pay, extra duties, hard labor, and restrictions on liberty, may be imposed through nonjudicial punishment or by a court-martial, this paper discusses maximum punishments primarily in relation to confinement. The lack of discussion of a bad-conduct or dishonorable discharge is not intended to diminish the severity of a punitive discharge, which is the only court-martial punishment described as "severe" and carrying a stigma. U.S. DEP'T OF ARMY, DA-PAM 27-9, MILITARY JUDGES' BENCHBOOK 66-67 (Sep. 15, 2002).

The UCMJ currently defines offenses that fall into three broad categories: crimes that are purely military offenses with no corresponding civilian provisions,⁸ common crimes that appear in both the UCMJ and in most state and federal criminal codes,⁹ and offenses that by definition or explanation¹⁰ are related to military operations, combat, or war.¹¹ Where the UCMJ appears to have stagnated is in codifying breaches of evolving international humanitarian laws affecting warfare. The UCMJ was enacted in 1950, five years before the United States ratified the Geneva Conventions. During every conflict, reports of serious misconduct of U.S. forces emerge, and the U.S. military has responded by bringing such offenders before courts-martial. Yet, the convictions are for common crimes, not war crimes.

⁸ These offenses include dereliction of duty (Article 92, 10 U.S.C. § 892), insubordinate conduct toward a superior (Article 91, 10 U.S.C. § 891), failure to report for duty at the time prescribed (Article 86, 10 U.S.C. § 886), and desertion (Article 85, 10 U.S.C. § 885).

⁹ Examples of offenses falling under this category include drunk driving (Article 111, 10 U.S.C. § 911), wrongful use of illegal drugs (Article 112a, 10 U.S.C. § 912a), larceny (Article 121, 10 U.S.C. § 921), rape (Article 120, 10 U.S.C. § 920), and housebreaking (Article 130, 10 U.S.C. § 930).

¹⁰ Among these offenses are missing a movement (Article 87, 10 U.S.C. § 887), misbehavior before the enemy (Article 99, 10 U.S.C. § 899), a subordinate compelling surrender (Article 100, 10 U.S.C. § 900), improper use of a countersign (Article 101, 10 U.S.C. § 901), forcing a safeguard (Article 102, 10 U.S.C. § 902), failing to safeguard abandoned or captured property, looting or pillaging (Article 103, 10 U.S.C. § 903), aiding the enemy (Article 104, 10 U.S.C. § 904), and misconduct as a prisoner (Article 105, 10 U.S.C. § 905).

Some of these articles fall into this class by the factual context in which they occur. For example, if a sailor returns one day late from leave, he could be subject to punishment for being absent without authority under Article 86. If the same tardiness caused him to miss the scheduled departure of his ship, he may be punished for missing a movement under Article 87, which carries a much greater penalty. The maximum penalty allowed for being absent without authority for three days or less is one month of confinement. In contrast, missing a movement through neglect allows for a maximum punishment of one year of confinement and a bad-conduct discharge. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* app. 12, at 1 (2002) [hereinafter MCM]. (Note that, in addition to the UCMJ, the Manual for Courts-Martial contains rules promulgated under the President's constitutional authority as Commander-in-Chief, and as provided for in Article 36 of the UCMJ. U.S. CONST. art. II, §. 2, cl. 1; 10 U.S.C. § 836. These rules include the Rules for Courts-Martial, Military Rules of Evidence, and the maximum punishments.)

¹¹ In the 1928 Manual for Courts-Martial, Articles of War 75-82 (misbehavior before the enemy, subordinate compelling commander to surrender, improper use of countersign, forcing a safeguard, captured property to be secured for public service, dealing in captured or abandoned property, corresponding with or aiding the enemy, and spying) were listed under the subheading "War Offenses." U.S. DEP'T OF ARMY, *MANUAL FOR COURTS-MARTIAL* 221-22 (1928) (corrected through 1943) [hereinafter 1928 MCM]. UCMJ Articles 101, 105, and 106 explicitly include the words "in time of war" in the text of the statute; Articles 99, 100, 102, 103, and some provisions of Article 104 necessarily imply deployment or combat circumstances. 10 U.S.C. §§ 899-906.

A few UCMJ articles allow for a greater punishment during a time of war: the offenses of desertion (Article 85; 10 U.S.C. § 885), striking or willfully disobeying a superior commissioned officer (Article 90; 10 U.S.C. § 890), misbehavior of a sentinel (Article 113, 10 U.S.C. § 913) may trigger the death penalty in time of war; the maximum punishment for a self-inflicted injury during a time of war increases from five to ten years (Article 115; 10 U.S.C. § 915).

This paper analyzes the limitations and disadvantages of charging war crimes under Title 10 and examines five proposals for closing the gap on war crimes that exists between military law and federal criminal law. First, Congress could add another article to the UCMJ to specifically cover war crimes as part of codified military law. Second, Congress could amend the UCMJ and change the language regarding the prosecution of only non-capital crimes through the general article. By changing a few words in Article 134, lawmakers could convert the existing limitation on subject matter jurisdiction into a limitation on sentencing. Third, Congress could lift the general article's jurisdictional limitation to non-capital offenses only for those offenses that are eligible for direct importation from federal criminal law (and not the lesser disorders that prejudice military discipline or injure the reputation of the service) or only for specified federal crimes such as the War Crimes Act. Fourth, lawmakers could amend the Title 18 provisions to remove capital punishment. Finally, military authorities could consider trying U.S. service members before a military commission for specific law of war offenses, an avenue that has not been tested since the creation of the UCMJ. Ultimately, this paper proposes adding a new War Crimes article to the UCMJ to 1) align the UCMJ with existing federal criminal law, 2) better insulate U.S. military members from the use of military commissions, and 3) seize upon the secondary preventive benefits of having a separate article that specifically defines and punishes war-related crimes.

Part II of this paper provides a brief history of military statutory law from the 1775 Articles of War to the UCMJ. This part then describes the historical development of how military jurisdiction was exercised and expanded since the implementation of the initial American Articles of War, eventually leading to the creation and evolution of the military

commission. This section serves as a backdrop to analyze the possible modern use of the military commission to try U.S. service members for offenses against the law of war.

Parts III, IV, and V focus on the mechanics of the UCMJ. In order to fully analyze how military members are and can be charged with war crimes under current military law, it is crucial to understand where courts-martial and military commissions derive their authority, how the general article is used to import federal criminal offenses into trials by court-martial, and how Congress has limited the reach of the general article. Part III examines the statutory grant of jurisdiction to general courts-martial under the UCMJ. This section focuses in particular on Article 18, which grants general courts-martial jurisdiction to act in two spheres of competence: 1) as courts-martial trying offenses contained in Title 10, and 2) as military commissions trying persons who are triable under the law of war. This part goes on to examine the legislative history of the UCMJ to analyze Congress's intent regarding the application of the military commission to the U.S. service member. Part IV explains the UCMJ's general article and how offenses charged under the three clauses of Article 134 differ in their subject matter and elements. A grasp of the fundamentals of Article 134 is crucial to any military prosecution that seeks to base its charges on a federal criminal statute, such as the federal War Crimes Act. Next, Part V discusses certain limitations of Article 134. Not all federal criminal statutes are eligible for importation into trials by court-martial. When a federal criminal statute such as the War Crimes Act or the anti-torture statute authorizes the death penalty, that statute may not be imported under the Article 134. This section explains the case that erected a bar to charging capital offenses under the general article (Article 134) and examines the scope of the bar.

Part 0 ties the previous sections together and takes a deeper look at the War Crimes Act. This section first provides an overview of the War Crimes Act and its legislative history. Although the legislative history contains some discussion on the use of military commissions and the Department of Defense (DoD) practice of charging U.S. armed forces personnel with common crimes under the UCMJ, the analysis did not go deep enough. There was no apparent discussion of the need to update the UCMJ following the codification of war crimes under domestic criminal law. This section next discusses how the War Crimes Act might impact the use of military commissions to try U.S. armed forces personnel for acts that violate the federal statute and constitute grave breaches of the Geneva Conventions. Finally, this section discusses how the limitations described in Part V, particularly the bar to charging capital offenses under Article 134, affect the importation of both the War Crimes Act and the anti-torture statute into the UCMJ.

Part VII comments on the inadequacy of the status quo and the DoD's reliance on common crimes to bring what are often in reality war crimes before courts-martial. This section takes a look at how the status quo can impact double jeopardy and the perceived compliance of the United States with its international obligations. This section also scrutinizes the use of Articles 92 (dereliction of duty), 93 (maltreatment of subordinates), and 128 (assault) to argue the current inadequacy of the use of courts-martial to charge war crimes. Finally, Part VIII discusses five alternatives for holding U.S. military members accountable for war crimes. Appendix 1 provides a proposed new UCMJ article that integrates war crimes into Title 10 and a summary, in Appendix 2, of potential war crimes allegations stemming from the current conflicts in Iraq and Afghanistan. s

II. THE DEVELOPMENT OF MILITARY LAW

A. From the Articles of War to the Uniform Code of Military Justice: A Brief History

The UCMJ can trace its American roots to the Articles of War of 1775. The American Articles of War consisted of rules for the continental army that were based on the British Articles of War.¹² The push for independence in the American colonies created an urgent demand to implement a military code of their own, and England's system was both convenient and familiar.¹³ In 1776, the Articles of War were modified and adopted at the suggestion of General Washington.¹⁴

The textual focus of the early codes remained on the conduct of hostilities and the maintenance of military discipline. The early American codes did not specifically include common crimes in their scope, but they contained a general provision for trying non-capital crimes, disorders, and neglects prejudicial to good order and military discipline.¹⁵ General George Washington reported trials of soldiers for killing a cow, theft of fowl, stealing shirts and blankets, and assaulting civilians,¹⁶ crimes which were likely punished under the general article. Later versions of the Articles of War incorporated some common crimes, but until

¹² The American Articles of War derived its substance from the British Articles of 1774, which in turn developed from various codes ordained by the King of England. WILLIAM B. AYCOCK & SEYMOUR W. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 5-9 (1955); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 18-20 (photo. reprint 1988) (1920); *Establishment of Military Justice: Hearings of S. 64 Before the Senate Subcomm. on Mil. Affairs*, 66th Cong. 24 (1919)[hereinafter *Establishment of Military Justice Hearings*] (testimony of Maj. J.E. Runcie, U.S. Army (Retired)).

¹³ *Establishment of Military Justice Hearings*, *supra* note 12, at 25 (testimony of Major (Ret.) Runcie).

¹⁴ AYCOCK & WURFEL, *supra* note 12, at 10. These Articles were apparently adopted without public discussion. *Establishment of Military Justice Hearings*, *supra* note 12, at 25 (statement of Sen. George E. Chamberlain). General Washington and other military men continued to have influence in the conventions leading up to the ratification of the Constitution. AYCOCK & WURFEL, *supra*, at 11-12. As a 22-year-old infantry captain-lieutenant, John Marshall was appointed the Deputy Judge Advocate in the Army of the United States in 1777 and helped to shape the development of American military law before his appointment to the Supreme Court. *Id.* at 11.

¹⁵ AM. ARTICLES OF WAR OF 1775, art. L; AM. ARTS OF WAR OF 1776, § XVIII, art. 5. These codes are reprinted in WINTHROP, *supra* note 12, at 953-71.

¹⁶ *O'Callahan v. Parker*, 395 U.S. 258, 306 n.3 (1969), *overruled by Solorio v. United States*, 483 U.S. 435 (1987). The Court in *O'Callahan* noted that the appendix to the Brief for the United States contains other examples of military punishment for non-military crimes imposed between 1775-1815.

the twentieth century military jurisdiction over serious crimes such as rape and murder attached only during wartime.¹⁷ Through World War II, military prosecutions for the crimes of rape and murder was limited to peacetime offenses committed outside of the United States.¹⁸

Congress modified the Articles of War in 1806, 1874, and 1916, with the latter date marking the first complete revision of the military code.¹⁹ The Articles were again amended in 1920 to incorporate recommended changes resulting from experiences in World War I and, with minor adjustments, governed the U.S. Army through World War II.²⁰ With the experience of a second major war revealing the need for further reforms,²¹ the Articles were substantially amended and became effective for the U.S. Army on February 1, 1949.²²

In the meantime, Congress worked at creating a code that would apply to all branches of the military and create greater uniformity in the substantive and procedural law governing the administration of military justice.²³ The proposed uniform code drew from the Articles

¹⁷ WAR DEP'T, COMPARISON OF PROPOSED NEW ARTICLES OF WAR WITH THE PRESENT ARTICLES OF WAR AND OTHER RELATED STATUTES 47 (1912), *available at* http://www.loc.gov/rr/frd/Military_Law/new_articles_war.html.

¹⁸ ARTICLES OF WAR, arts. 92-93, *reprinted in* 1928 MCM, *supra* note 11, at 223.

¹⁹ AYCOCK & WURFEL, *supra* note 12, at 13-14.

²⁰ *Id.* at 14.

²¹ Of more than 15,000,000 Americans who served during World War II, approximately 90,000 were court-martialed and 141 were executed. 95 CONG. REC. H5723-34 (daily ed., May 5, 1949) (statements of Reps. Elston and Vinson). Congressman Elston, who chaired the committee that advocated for the 1949 revisions to the Articles of War, discussed his concerns about command control over courts-martial, *supra* at H5723. Representative Durham echoed this concern. Sharing feedback he received from lawyers who had first-hand experience with military justice actions during the war, he described how they found it disturbing "that the same official was empowered to accuse, to draft and direct the charges, to select the prosecutor and defense counsel from the officers under his command to choose the members of the court, to review and alter their decision, and to change any sentence imposed." *Id.* at H5725. Representative Durham also commented on the public surprise at learning that many judges, prosecutors, and defense counsel at courts-martial were not lawyers and had no legal training, *id.* at H5725, and highlighted one case in which a Navy enlisted man with a good combat record received a five-year sentence and a dishonorable discharge for hitting a young officer (a "90-day wonder") during an escalating argument, *id.*

²² AYCOCK & WURFEL, *supra* note 12, at 14.

²³ *Uniform Code of Military Justice: Hearings on H.R. 2498 before the House Subcomm. on Armed Services, 81st Cong. 600 (1949) [hereinafter 1949 House Hearings]* (testimony of Prof. Edmund M. Morgan, Jr., Harvard Law School).

of War and Articles for the Government of the Navy, and would eventually supersede these codes as well as the Disciplinary Laws of the Coast Guard.²⁴ The objective of the new military code was to maximize the efficiency of the fighting force while safeguarding the military justice system from arbitrariness and abuse.²⁵ Congress strove to find the balance. After a series of hearings throughout the spring of 1949 on three congressional bills,²⁶ the Uniform Code of Military Justice became effective in 1951.²⁷

The UCMJ permanently changed the nature of military law. Perhaps the most significant structural change was in its uniformity across all branches of service.²⁸ The UCMJ added new articles defining crimes and established rules designed to protect the substantive and procedural due process rights of military personnel.²⁹ Substantively, the new provisions designed to ensure a fair trial included the right against self-incrimination; equal

²⁴ *Id.* The Marine Corps and Air Force did not have separate codes. *Id.* Congress also considered the federal criminal code and the penal codes of several states as well as numerous reports on World War II military and naval justice. S. REP. NO. 81-486, at 4 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2222, 2226.

²⁵ Representative Carl Vinson, after whom the third nuclear-powered aircraft carrier was later named, captured the tension between these two goals:

The objective of civilian society is to make people live together in peace and reasonable happiness. The object of the armed forces is to win wars. This being so, military institutions necessarily differ from civilian institutions. Many military offenses are acts that would be rights in the civilian society. . . . Our problem stems from our desire to create an enlightened system of military justice which not only preserves and protects the rights of the members, but also recognizes the sole reason for the existing of a military establishment—the winning of wars.

95 CONG. REC. H5725 (daily ed., May 5, 1949).

²⁶ See generally 1949 House Hearings, *supra* note 23 (covering March 7 through April 4, 1949); *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong. (1949) [hereinafter 1949 Senate Hearings] (covering April 27 through May 27, 1949). These materials are available on the Library of Congress's website on military legal resources, at http://www.loc.gov/rr/frd/Military_Law/ (last visited May 21, 2005). After incorporating amendments that were debated at the hearings, House Bill 4080 was substituted as a "clean bill" for House Bill 2498. 95 CONG. REC. H5723-34 (daily ed., May 5, 1949) (statement of Rep. Brooks).

²⁷ H.R. 4080, 81st Cong. (1950) (enacted).

²⁸ The UCMJ was intended to be the sole statutory authority for the listing and definition of offenses; the infliction of limited disciplinary penalties in nonjudicial actions; pretrial and trial procedure; constitution of three classes of courts-martial; establishing the eligibility and qualifications of court-martial panel members; the review of findings and sentence; and the creation of a court of appeals with civilian-appointed judges. S. REP. NO. 81-486, at 1-2, *reprinted in* 1950 U.S.C.C.A.N. 2222, 2223.

²⁹ *Id.* at 2-3, 1950 U.S.C.C.A.N. 2224. The UCMJ also changed the role of the law officer from that of a deliberating and voting member to one that is more consistent with the function of a judge in civil practice. *Id.* at 6, 1950 U.S.C.C.A.N. 2228.

processes for the defense and prosecution to obtain witnesses and depositions; the prohibition on receiving guilty pleas in capital cases; the requirement that both prosecution and defense counsel be legally trained; the right for an enlisted accused to be tried by a panel that includes enlisted members; the requirement that the law officer (now the military judge) instruct the panel members on the record regarding the elements of the offense, presumption of innocence, and burden of proof; the provision mandating that voting on findings and sentencing be conducted by secret written ballot; and an automatic review of the trial record.³⁰

The ideological change behind the UCMJ is just as significant. With a large portion of the effort devoted to safeguarding the rights of military members facing trial by court-martial, Congress also created a code that sought to transform military law from its status as a tool of command³¹ into a legal system that acknowledged that the citizen soldiers are entitled to enjoy the fundamental rights that they swore to defend.³²

B. The Exercise of Military Jurisdiction

From the founding of the United States, the exercise of military jurisdiction proved to be flexible and responsive. Since the Revolutionary War era, armed conflicts and incidents of espionage revealed holes in existing law. Military law, the law of the military government, martial law, and the law of war provided the framework to fill those gaps and

³⁰ *Id.* at 2-3, 1950 U.S.C.C.A.N. 2224.

³¹ *See Establishment of Military Justice Hearings, supra* note 12, at 23-25 (testimony of Maj (Ret.) Runcie, describing how the basis for the Articles of War was military command and not a cogent concept and system of military law).

³² [W]e must move to correct a system which is not organically sound and which permits continued injustice to some. . . . [T]he system needs a complete and thorough overhauling in order to bring it in line with our concepts of judicial procedure and our ideas of the administration of justice, and our long-established principles safeguarding the rights of individuals as citizens of this great Republic who happen to be in the armed forces.

95 CONG. REC. H5726 (daily ed., May 5, 1949) (statement of Rep. Philbin).

implement new types of tribunals or prosecute newly codified offenses. Thus, since the first Articles of War were enacted, the exercise of military jurisdiction expanded both in breadth and depth. This expansion occurred by utilizing all four types of exercise of military jurisdiction.

1. Legal Authority: The Sources of Military Jurisdiction

Today's Manual for Courts-Martial lists the circumstances in which the military may exercise its jurisdiction: under military law,³³ a military government,³⁴ martial law,³⁵ and the laws of war.³⁶ Each has a distinct origin of authority and range of application. *Military law*, or the soldier's code, derived from congressional authority in the form of the Articles of War.³⁷ As a statutory grant of authority, military law covered only those persons and offenses described in the Articles of War (and now described in the Uniform Code of Military Justice). A *military government* (or occupation government) may be exercised at the direction of the President, with the express or implied authorization of Congress,³⁸ as a part of military operations in non-U.S. territory. By its nature, the military government was

³³ Colonel William Winthrop referred to military law as "the code of the soldier." *Supra* note 12, at 817. The current definition of military law is the exercise of military jurisdiction by a "government in the exercise of that branch of the municipal law which regulates its military establishment." MCM, *supra* note 10, pt. I, at 1.

³⁴ A military government is defined as the belligerent occupation of the enemy's territory. 1928 MCM, *supra* note 11, at 1; MCM, *supra* note 10, pt. I, at 1.

³⁵ The Constitution implicitly grants congress the authority to impose martial law through its power to "provide for calling forth the Militia to execute the Laws of the Union." U.S. CONST. art. I, § 8, cl. 15. Martial law exists when a portion of the United States exercises military rule over its own citizens and inhabitants in a justifiable emergency. WINTHROP, *supra* note 12, at 817. Unfortunately, the Manual for Courts-Martial was not as clear as Mr. Winthrop in limiting the application of martial law to areas of the United States and its territories. The Manual merely noted that martial law existed when "a government temporarily govern[s] the civil population of a locality through its military forces, without the authority of written law, as necessity may required" 1928 MCM, *supra* note 10, pt. I, at 1. This definition was unchanged in the 1951 Manual for Courts-Martial, but later the words "without the authority of written law" were removed. Compare UNITED STATES, MANUAL FOR COURTS-MARTIAL 1 (1951) [hereinafter 1951 MCM] with MCM, *supra* note 21, pt. I, at 1.

³⁶ MCM, *supra* note 10, pt. I, at 1.

³⁷ Louis Fisher, Cong. Research Service No. RL32458, *Military Tribunals: Historical Patterns and Lessons*, July 9, 2004, at 1.

³⁸ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 142 (1866) (Chase, J., dissenting opinion).

limited in territorial scope and continued only as long as the occupation existed.³⁹ The U.S. or a state government may resort to the use of *martial law* over portions of its own territory as a form of self-defense in response to a justifiable emergency.⁴⁰ The imposition of martial law allows the military to prosecute both common crimes within that territory as well as violations of orders promulgated by military authority. Because martial law cannot co-exist with civil liberty, its jurisdiction ends once the civil courts are open and acting.⁴¹ The exercise of military jurisdiction under *the law of war* is distinct from the other three forms of military jurisdiction. The exercise of military jurisdiction over violations of the laws of war has its roots in the early Articles of War, custom, and international law.⁴²

2. The Historical Development of Military Tribunals

Early military codes vested court-martial jurisdiction over a narrow range of offenses and classes of persons. The Articles of War were frequently amended during the Revolutionary War period as situations arose that did not fit squarely within the existing Articles. Later, as military operations moved beyond the borders of the thirteen colonies, new threats to military effectiveness, command, and credibility drove the need to create other military tribunals, including military commissions. Because these other military tribunals were aimed at filling in gaps in military law and jurisdiction, especially with respect to persons who were not in the U.S. Army, they were not intended to supplant the court-martial.

³⁹ WINTHROP, *supra* note 12, at 818.

⁴⁰ *Id.* at 817, 820.

⁴¹ *Duncan v. Kahanamoku*, 327 U.S. 304, 327-35 (1946). The Court in *Duncan* set the bar fairly high: “the civil courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended.” *Id.* at 330.

⁴² The fourth area of military jurisdiction exercised “by a government with respect to offenses against the law of war” was first listed in the Manual for Courts-Martial in 1951. Compare 1951 MCM, *supra* note 35, at 1, with MCM, *supra* note 10, pt. I, at 1.

Instead, two separate spheres of jurisdiction developed in the court-martial and military commission, and the two classes of military tribunals continued to complement one another.

The Articles of War of 1775 governed all soldiers as well as civilians who served with the continental army in the field.⁴³ The Articles were the primary vehicle for prosecuting specified offenses committed by persons described in the Articles, especially continental soldiers. Compared to the modern UCMJ, the 1775 Articles of War focused exclusively on offenses that affected military command and discipline⁴⁴ and did not directly codify common crimes as part of military law.⁴⁵

The first revisions of the Articles of War dealt with the offenses of spying and aiding the enemy. The 1775 code initially limited the authority of the continental army to try non-military traitors or spies. Article XVIII of the 1775 Articles of War authorized a trial by court-martial for corresponding with or providing intelligence to the enemy when the offense was committed by a person “belonging to the continental army”⁴⁶ but it was silent about other categories of persons mentioned in the Articles. This left an obvious gap in jurisdiction. The provision was amended later in 1775 to cover “all persons”⁴⁷ and thus extended court-martial jurisdiction over enemy soldiers as well as civilians with no military affiliation. Similarly, through 1775 the separate offense of aiding the enemy was limited to

⁴³ AM. ARTS. OF WAR OF 1775, arts. I, XXXII and XLVIII, June 30, 1775, *reprinted in* WINTHROP, *supra* note 12, at 953, 956.

⁴⁴ The 1775 Articles of War included at least thirty purely military offenses.

⁴⁵ The general article (Article L) in the 1775 Articles of War authorized the trial by court-martial of all non-capital crimes that negatively impacted military order and discipline. AM. ARTS. OF WAR OF 1775, art. L, June 30, 1775, *reprinted in* WINTHROP, *supra* note 12, at 957. As noted above in footnote 16 and accompanying text, General Washington may have used this general article to import those local crimes into military trials when those acts affected the military in some way. Thus, although these crimes were not directly codified in the Articles of War, the continental army had some capacity to incorporate into military law certain offenses that directly affect military discipline.

⁴⁶ AM. ARTS. OF WAR OF 1775, art. XVIII, June 30, 1775, *reprinted in* WINTHROP, *supra* note 12, at 955.

⁴⁷ Additional Article 1 of the November 7, 1775, not only broadened personal jurisdiction over the offense, it also expressly authorized the court-martial to sentence the offender to death. AM. ARTS. OF WAR OF 1775, Add'l Art. 1, Nov. 7, 1775, *reprinted in* WINTHROP, *supra* note 12, at 959.

members of the continental army only,⁴⁸ but in 1776 it, too, was amended to provide jurisdiction over any person.⁴⁹ The expansion of military jurisdiction was necessarily directed at the civilian component of the continental army because the Articles of War that were changed by this amendment previously applied only to members the continental forces.

The continental congress extended military law to non-continental forces in August of 1776 when it passed a resolution stating that all persons who did not owe allegiance to America and who were found “lurking as spies in or about the fortifications and encampments of the armies of the United States” shall be penalized with death or punishment as directed by a court-martial.⁵⁰ Although this resolution was not directly incorporated into the Articles of War of 1776 that were enacted a month later, the resolution’s premise was used in 1780 to try spies by a military, rather than civil tribunal.⁵¹ Recognizing the success of military trials of spies during the Revolutionary War period, Congress incorporated the language of the 1776 resolution directly into the Articles of War of 1806 and granted general courts-martial the express authority to try non-citizens and enemy spies for espionage during wartime.⁵² This addition was founded on principles of the law of nations and law of war.⁵³

⁴⁸ AM. ARTS. OF WAR OF 1775, art. XVII, June 30, 1775, *reprinted in* WINTHROP, *supra* note 12, at 955. The enactment of November 7, 1775, did not affect this article.

⁴⁹ AM. ARTS. OF WAR OF 1776, sec. XIII, art. 18, Sep. 20, 1776, *reprinted in* WINTHROP, *supra* note 12, at 967.

⁵⁰ Fisher, *supra* note 37, at 2, *citing* 5 JOURNALS OF THE CONTINENTAL CONGRESS 693 (1905). The British had similar provisions for dealing with spies, and the month after the resolution was passed British forces apprehended a member of the continental army behind British lines, dressed in civilian clothes, and carrying information about British fortifications. *Id.* Captain Nathan Hale was tried by a British military court and hanged. *Id.*

⁵¹ Fisher, *supra* note 37, at 2 (Major John Andre was captured in civilian clothes and had papers in his boots that contained information on West Point, which he had received from American General Benedict Arnold); WINTHROP, *supra* note 12, at 832 (Joshua Hett Smith was also tried by court-martial in 1780 for assisting Gen. Benedict Arnold).

⁵² AM. ARTS. OF WAR OF 1806, art. 101, § 2, *reprinted in* WINTHROP, *supra* note 12, at 985. The text of the article stated:

[I]n time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.

Id.

By this time Congress was acting under its constitutional authority to make rules governing the land and naval forces and to define and punish spying under the laws of nations.⁵⁴ Soon after the Articles of 1806 were adopted, the military used this authority to bring spies and traitors, sometimes with questionable latitude, before courts-martial during the War of 1812⁵⁵ and the Seminole War of 1818.⁵⁶

During later operations, military jurisdiction again revealed its limitations. Statutorily, the military lacked jurisdiction to try civilians in occupied territory. In time of war, commanders felt the need for a tribunal that could exercise jurisdiction over criminal acts, especially when committed by civilian inhabitants of the occupied territory.⁵⁷ When rebellions erupted within the territory of the United States and martial law was imposed, the

⁵³ *Id.*

⁵⁴ U.S. CONST., art. I, § 8, cl. 10 and cl. 14. Where the British King was the sole authority for regulation of his military, the U.S. Constitution specifically empowered Congress, not the executive, to make rules governing the land and naval forces.

⁵⁵ The trial of Louis Louallier is an interesting account of the use of a court-martial. In late 1814, after General Andrew Jackson imposed martial law in New Orleans, Louallier published an article in the newspaper that questioned Jackson's policy of trying persons accused of a crime before a military tribunal instead of a civil judge. Fisher, *supra* note 37, at 6-7. Jackson had Louallier arrested on charges for inciting mutiny and disaffection in the army. *Id.* at 7. The civil courts were open, and Louallier's lawyer obtained a writ of habeas corpus after a U.S. District Court judge determined that the martial law could no longer be authorized following the defeat of the British. *Id.* Jackson responded by having the judge arrested and jailed for his alleged complicity in aiding and abetting mutiny. *Id.* At trial, Louallier challenged the court-martial's jurisdiction to try someone who was not in the army or militia; he was also accused of spying, but "the court considered it a stretch that a spy would publish his views in a newspaper that circulated in Jackson's camp." *Id.* The court-martial acquitted him, but Jackson kept Louallier in jail until he received official confirmation of successful peace negotiations. *Id.* After General Jackson rescinded martial law, the formerly jailed judge cited Jackson for contempt of court and fined him \$1000. WINTHROP, *supra* note 12, at 822.

Although Congress passed legislation to remit General Jackson's \$1000 fine thirty years later, this cannot be construed as a complete ratification of his imposition of military and martial law in New Orleans. See Fisher, *supra* note 37, at 8. The bill was strenuously debated "because lawmakers differed sharply on whether more credit was due to Jackson for defending the city or to [the judge] for defending the Constitution." *Id.*

⁵⁶ General Jackson created a "special court" to try two British subjects, Alexander Arbuthnot and Robert Christy Ambrister, for inciting Creek Indians to wage war against the U.S.; Arbuthnot was also accused of spying and inciting the Indians to murder two men. Fisher, *supra* note 37, at 8. The court found Arbuthnot guilty on all charges and ordered him to be hanged. *Id.* at 9. After Ambrister was found guilty of most charges, Jackson directed him to be shot, despite the fact that the court's sentence did not include the penalty of death. *Id.* The next year, the House Committee on Military Affairs criticized Jackson for disregarding the court's decision; but the full House on a majority vote supported the trials and declined to censure Jackson. *Id.* at 10. A Senate report criticized Jackson for imposing his will arbitrarily, but took no action on the report before adjourning. *Id.* at 11.

⁵⁷ WINTHROP, *supra* note 12, at 831; see Fisher, *supra* note 37, at 11.

Articles of War similarly lacked express authority to prosecute common crimes by courts-martial, especially when committed by persons with no military connection.⁵⁸ This gap in military law during times of war⁵⁹ led to the creation and use of a new type of tribunal: the military commission.

The first mention of the military commission appeared in 1847 during the war with Mexico⁶⁰ after the U.S. Army implemented a military government in the conquered provinces.⁶¹ General Winfield Scott issued a general order⁶² authorizing trials before a military commission for:

Assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing.⁶³

The nature of this order necessarily contemplated the trial of both civilians⁶⁴ and military members by the military commission. At this time, the army was still operating under the

⁵⁸ See Fisher, *supra* note 37, at 16. During the 1916 hearings on revising the Articles of War, Brigadier General Enoch H. Crowder, Judge Advocate General of the Army, acknowledged that the jurisdiction of military commission or "war court" was primarily limited to trials of inhabitants of the theater of hostilities to try criminal offenses that were cognizable by civilian courts during peacetime. SEN. REP. NO. 64-130, at 40 (1916).

⁵⁹ SEN. REP. NO. 64-130, at 41 (testimony of Gen. Crowder, noting that the war court grew out of "usage and necessity").

⁶⁰ WINTHROP, *supra* note 12, at 832.

⁶¹ *Id.* at 800.

⁶² *Id.* at 832. Gen. Scott based his order on the principles of martial law, which he wanted to use to maintain order within his ranks, avoid guerilla warfare, and provide some protection for Mexican property rights and respect for religious buildings. Fisher, *supra* note 37, at 12. Although the scheme functioned well, Gen. Scott was not successful in persuading Congress to add a corresponding Article of War. *Id.* at 12-13.

⁶³ WINTHROP, *supra* note 12, at 832. The trials that arose from the general order included additional offenses that, although not expressly contained in the order, were common crimes in a civilian system: pick-pocketing, burglary, fraud, carrying a concealed weapon, or manslaughter. *Id.* Some of the non-specified offenses tried were aimed at imposing punishment when the victim or target of the crime was the U.S. government or its soldiers: attempting to defraud the United States, introducing liquor into U.S. barracks, threatening the lives of soldiers, or attempting to pass counterfeit money. *Id.*

⁶⁴ At least one scholar has opined that the military commissions were established to enable the trial of civilians for war crimes. Douglass Cassel, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 NEW ENGLAND L. REV. 421, 431 n.46 (2001).

1806 Articles of War, which did not directly vest courts-martial with jurisdiction over these offenses.⁶⁵ General Scott's order did not describe violations of the laws of war, but a separate tribunal called the council of war was utilized on a few occasions to prosecute violations of the laws of war, such as acts of guerilla warfare and attempts to entice U.S. soldiers to desert.⁶⁶ The main distinction between the council of war and the other military commissions was found in the classes of offenses each tribunal covered,⁶⁷ but the council of war and the military commission used similar procedures.⁶⁸ By the Civil War, the term "council of war" fell into disuse, and trials under the law of war, martial law, and occupation governments all fell under the term "military commission."

Overall, the military commission "represented a blend of executive initiative and statutory authority . . ."⁶⁹ The tribunal provided an efficient means to execute both congressional war powers and the president's directives as Commander-in-Chief.⁷⁰ General Scott recognized how this legislative-executive blend differed from an exercise of jurisdiction under statutory military law. His order prohibited the military commissions from trying any case that was "clearly cognizable" by a court-martial.⁷¹ Just as General Scott's order provided the historical foundation for the military commission, it also established a preference to try members of the U.S. armed forces by court-martial over a military

⁶⁵ However, under the existing Articles of War, the army could prosecute persons subject to the Articles of War for non-capital crimes through the application of the general article. *See, e.g., supra* note 16 and accompanying text.

⁶⁶ WINTHROP, *supra* note 12, at 832-33.

⁶⁷ The creation of the council of war necessarily acknowledged that its jurisdiction differed from the military commissions that effectively stood in for civilian courts during periods of military governments or martial law. *See* WINTHROP, *supra* note 12, at 832-33. For an excellent discussion on the different species of military commissions, *see* John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 902-13 (2003).

⁶⁸ WINTHROP, *supra* note 12, at 832-33.

⁶⁹ Fisher, *supra* note 37, at 13.

⁷⁰ WINTHROP, *supra* note 12, at 831.

⁷¹ Fisher, *supra* note 37, at 13.

commission when offenses were cognizable by both tribunals. This preference remains intact today.

Military commissions were soon widely used as department commanders issued their general orders authorizing the scope and jurisdiction of military tribunals.⁷² In 1863, Congress formally recognized the military commission and expanded its jurisdiction to allow certain serious crimes (including murder, robbery, and assault with intent to commit rape) committed by U.S. soldiers in time of war or rebellion to be punished *either* by a court-martial *or* a military commission.⁷³ Spies, too, became triable either by court-martial or military commission.⁷⁴ In 1864, Congress statutorily authorized trials of guerillas by military commission as well.⁷⁵ Through the Civil War the military commission proved to be a versatile tool, and by the end of the Reconstruction period more than 2,000 such cases were tried.⁷⁶

After the Civil War the exposure of members of the U.S. armed forces to trials by military commission lessened with a corresponding expansion of court-martial jurisdiction. When Congress revised the Articles of War in 1874, it codified in the new Article 58 those serious offenses which had been previously punishable by military commission under the

⁷² WINTHROP, *supra* note 12, at 833.

⁷³ Act of March 3, 1863, § 30, ch. 75, 12 Stat. 736. These offenses included murder, manslaughter, robbery, larceny, assault and battery with intent to kill or commit rape. This legislation formed the basis of what later became later the fifty-eighth Article of War. WINTHROP, *supra* note 12, at 833. However, when these offenses formally became part of the Articles of War, the text of the statute no longer authorized the trial of U.S. soldiers by military commission for these offenses. *See infra* text accompanying notes 78-79.

⁷⁴ WINTHROP, *supra* note 12, at 833.

⁷⁵ *Id.*

⁷⁶ U.S. DEP'T OF ARMY, PAM. 27-173, TRIAL PROCEDURE para. 7-5(a)(2)(b) (Dec. 31, 1992). Among the most notable Civil War military commissions is the trial of Captain Henry Wirz, the officer in charge of the prisoner of war camp at Andersonville, where more than 25,000 POWs were subjected to horrendous living conditions. *See generally* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 783-98 (Leon Friedman ed., 1972). The first charge alleged that Captain Wirz aided in the rebellion against the United States by conspiring to injure the health and destroy the lives of U.S. soldiers; the second charge alleged thirteen specifications in violation of the laws of war, including murder, subjecting prisoners to torture, and furnishing inadequate food and shelter. *Id.* at 784. With these charges, it appears that the military commission derived its authority based on two sources of law: under military law through Article 56 of the 1806 Articles of War and under the customary laws of war.

1863 legislation.⁷⁷ Where U.S. military members could previously be tried by military commission under the 1863 law for murder or assault with intent to commit rape, they were now tried under the Articles of War by court-martial.⁷⁸ In practice, the new article restricted the reach of the military commission over U.S. soldiers.⁷⁹

During the war in the Philippines, the military continued to exercise jurisdiction over U.S. soldiers and law of war violations through the use of courts-martial.⁸⁰ Once, when the

⁷⁷ The Articles of War of 1874 are reprinted in WINTHROP, *supra* note 12, at 986-96.

⁷⁸ Article 58 limited the temporal jurisdiction of Article 58 to a "time of war." This did not substantively differ from the temporal jurisdiction of the military commission. When a military commission tried offenses under an exercise of jurisdiction of a military government, the temporal jurisdiction of the commission began with the military occupation and ended with the signing of the peace treaty or other termination of the conflict. *Id.* at 837.

⁷⁹ Winthrop suggested that when Congress incorporated the Act of March 3, 1863, into the Articles of War of 1874, it apparently inadvertently omitted the words "or military commission" from the new Article. *Id.* at 833 n.71. This interpretation does not square with military practice and other portions of Colonel Winthrop's text. The use of a military commission to try the U.S. military member was intended to cover crimes not in the soldier's code. Once incorporated into the Articles of War, the offense would be tried by court-martial. This interpretation is supported by the intent of General Scott's initial order to maintain the distinction between the competing jurisdictions courts-martial and military commissions, *supra* note 71 and accompanying text, as well as Winthrop's own observations. First, earlier in his work Winthrop described the omission of the words "or military commission" from Article 58 as "an omission proper for the reason that a military commission is not the appropriate tribunal for the trial of military persons." *Id.* at 667 n.15. Second, according to Winthrop, military commissions could not legally try "purely military offences specified in the Articles of war and made punishable by sentence of court-martial; and in repeated cases where they have assumed such jurisdiction their proceedings have been declared invalid in General Orders." WINTHROP, *supra* note 12, at 841. Yet, jurisdiction of the military commission was upheld in cases involving the offenses of spying and aiding the enemy. *Id.* These limited exceptions make sense because these are the only two areas that, consistently since 1776, were not limited to members of the continental army and civilians accompanying the military in the field, and these are the only two offenses in the UCMJ's punitive articles (Articles 104 and 106) that expressly authorize the use of a military commission. 10 U.S.C. §§ 104, 106 (LEXIS through May 5, 2005).

⁸⁰ In 1903, Senate Document 213 transmitted a report to the President on the trials of U.S. soldiers conducted in relation to the war in the Philippines:

Brigadier General Jacob H. Smith was tried under the general article for conduct prejudicial to good order and discipline for instructing his soldiers that he "wanted no prisoners" and "[t]he more you kill and burn, the better you will please me . . ." S. DOC. NO. 57-213, at 2 (1903). He was found guilty of the charge, with some exceptions and substitutions, and was sentenced to be admonished. *Id.* at 3.

Major Edwin Glenn and First Lieutenant Julien Gaujot were also tried by court-martial under the general article for conduct prejudicial to good order and military discipline for subjecting prisoners to a form of punishment called the "water cure." *Id.* at 17-18. The officers were suspended from command for one and three months, respectively, and ordered to forfeit \$50 of their pay for the same period. *Id.*

First Lieutenant Norman Cook was tried for manslaughter under Article 58 for allegedly ordering three of his soldiers to unlawfully shoot three native Philippine natives. *Id.* at 19. Conflicting testimony at trial resulted in Lieutenant Cook's acquittal. *Id.* at 19, 30-33. Upon review, the President disapproved the proceedings and findings. *Id.* at 19.

Articles of War and customs involving the laws of war did not provide jurisdiction over a wartime offense of a *former* U.S. soldier, the use of the military commission was considered.⁸¹ World War II saw a resurgence of the use of the military tribunals to try Nazi saboteurs as unlawful combatants,⁸² violations of the law of war committed by non-U.S.

First Lieutenant Edwin Hickman was tried under the general article for immersing the heads of two detained natives under water several times for the purpose of extorting information. *Id.* at 33. He was also acquitted, and the President also disapproved the findings. *Id.* at 34.

Major Littleton Waller and First Lieutenant John Horace Arthur Day were both tried and acquitted of murder of Philippine natives. *Id.* at 44, 46. The natives were cargo bearers for a detachment stranded in rugged terrain; after a rescue was mounted and many U.S. soldiers were found to have died, the major ordered and lieutenant implemented a firing detail to shoot the natives in retaliation. *Id.* at 44-48. The Assistant Adjutant General sharply criticized the wrongfulness of the major's summary justice when there was no evidence of wrongdoing by the natives (except for some cases of desertion) and when the major was in telephonic contact with his brigade commander. *Id.* These findings for both officers were disapproved. *Id.* at 46, 48. Through World War I, a commander could send a case back for reconsideration on an acquittal. *1949 House Hearings, supra* note 23, at 608. The President's disapproval was a form of censure that expressed disagreement with the result and sometimes commented on the court-martial's failure to appreciate the gravity of the offense. WINTHROP, *supra* note 12, at 453.

First Lieutenant Preston Brown was charged with the murder of a native in his custody; the court-martial found him guilty of a lesser offense and sentenced him to five years at hard labor and a dismissal from the Army. S. DOC. NO. 57-213, at 48-49. However, the President reduced the sentence by mitigating the imprisonment to a forfeiture of pay and a reduction in lineal rank. *Id.* at 49.

⁸¹ Captain Cornelius Brownell was implicated in the death of a local priest suspected of sympathizing with insurgents. *Id.* at 80-92. The priest died after being subjected to the "water cure" in an attempt to extract information. *Id.* at 83. The problem for the Army was that Captain Brownell had been discharged from the service. *Id.* at 88. The Judge Advocate General wrote a letter to Senator Henry Cabot Lodge to request referral of the report to the Attorney General for an opinion on whether he could be brought to trial. *Id.* at 92. The letter discussed three possible procedures: the military commission, the trial by court-martial, and a trial by civilian authorities.

Starting with the military commission, the Judge Advocate General wrote, "A resort to torture in order to obtain either confessions or information from a prisoner of war is, in view of what has been said, a violation of the laws of war and, as such, is triable by military commission." *Id.* at 87. However, he noted that the jurisdiction of this type of military commission existed only within the confines of the occupied territory and ceased with the termination of the war, and the President had already proclaimed peace. *Id.* (Today, criminal tribunals will likely find that such temporal jurisdiction exists to try violations of the laws of war and other atrocity crimes after hostilities end. The international war crimes tribunals for Rwanda and the former Yugoslavia, both created in the mid-1990s, have been trying offenders long after the active hostilities have ceased.)

Next, the Judge Advocate General analyzed the fifty-eighth Article of War and determined that, because the text of the article limited the application to war time, the prosecution could not be instituted for similar reasons. S. DOC. NO. 57-213, at 87. Then, he considered whether the general article provided continuing military jurisdiction following a discharge and concluded that it could not. *Id.* at 87-88.

Finally, he considered whether the laws of the occupied territory could provide jurisdiction and concluded that U.S. soldiers in war time were answerable only to their own government. *Id.* at 89. Finding that criminal accountability could and should not be determined by the War Department, the Judge Advocate General asked Senator Lodge to seek out other options. *See id.* at 87-88.

⁸² *Ex parte Quirin*, 317 U.S. 1 (1942). Two other would-be Nazi saboteurs were tried by a military tribunal in early 1945. Fisher, *supra* note 37, at 46-47.

forces,⁸³ offenses committed by civilians in foreign territories under U.S. military occupation,⁸⁴ and offenses committed by civilians in areas under martial law.⁸⁵ Absent was the application of the military commission to U.S. service members. Instead, U.S. service members continued to be tried by courts-martial for crimes that could also be considered law of war violations.⁸⁶

III. ARTICLE 18: PROVIDING TWO SPHERES OF COMPETENCE FOR THE GENERAL COURT-MARTIAL

Surprisingly little of the legislative history of the UCMJ discusses the intent of the drafters and whether the new legislation allowed U.S. armed forces personnel to be tried by a military commission instead of court-martial for law of war violations. The drafters generally discussed how Article 18 provided the general court-martial with two roles: 1) to try persons subject to the UCMJ for offenses defined in Title 10, and 2) to act as a military tribunal under the law of war. Yet, despite the general focus of the UCMJ as a system of

⁸³ Allied military tribunals conducted in the far east during World War II yielded at least 3,000 sentences to confinement and 920 death sentences. Fisher, *supra* note 37, at 52. See also, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946).

⁸⁴ See, e.g., *United States v. Schultz*, 4 C.M.R. 104 (C.M.A. 1952) (although a U.S. civilian with no current military affiliation was tried by court-martial by the U.S. Army for vehicular homicide in occupied Japan, the findings were upheld because he could have been tried by a military occupation court); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (dependent wife of U.S. service member was lawfully tried by the U.S. Army in occupied Germany for the murder of her active duty husband).

⁸⁵ See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte White*, 66 F. Supp. 982 (D. Haw. 1944); *Ex parte Spurlock*, 66 F. Supp. 997 (D. Haw. 1944).

⁸⁶ See, e.g., *United States v. Lee*, 13 C.M.R. 57 (U.S.C.M.A. 1953) (soldier convicted of unpremeditated murder under Article 118 for shooting two Korean civilians to prevent a theft of government property); *United States v. Griffen*, 39 C.M.R. 586 (A.C.M.R. 1968) (soldier convicted of murder under Article 118 for shooting—under orders from his commanding lieutenant—a Vietnamese prisoner whose hands were tied behind his back); *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973) (officer convicted of crimes relating to the massacre at My Lai). Lieutenant William Calley was tried by a general court-martial and was convicted of murder and assault with intent to kill. 46 C.M.R. at 1138. Although the underlying incidents have been described as war crimes, Lieutenant Calley was charged under enumerated UCMJ articles, namely Articles 118 and 134. One author explains that it generally takes an extraordinary event capturing significant public attention to spur the military into prosecutions of its own military members for war crimes. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 76, at 775. One international scholar suggests that states may be reluctant to prosecute international crimes, including war crimes, which may have been carried out with the tacit approval of state authorities out of concern that the proceedings might involve state organs. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 279 (2003).

newly guaranteed substantive rights for the U.S. service member, there was little effort to address whether or how the use of the military commission applied to members of the U.S. armed forces.

The text of Article 18 describes the jurisdiction of general courts-martial:

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. . . .⁸⁷

The dual competence of the general court-martial is supported by Article 21, which generally preserves concurrent jurisdiction between a general court-martial acting as such and general court-martial operating as a military tribunal.

By the language of Article 18, Congress assigned multiple functions to the general court-martial. The first sentence of Article 18 describes the jurisdiction of the general court-martial when it acts under statutory U.S. military law contained in Title 10. In this first sphere of competence the general court-martial tries offenders for offenses that are defined by the UCMJ. Regarding personal jurisdiction, the words “persons subject to this chapter” in the first sentence of Article 18 refers to Article 2 of the UCMJ. Under Article 2, active duty military members, retired members of the armed forces, and prisoners of war, among other categories, are persons subject to the UCMJ and included in the scope of jurisdiction of the court-martial.⁸⁸ When a general court-martial acts under the jurisdictional grant of the first sentence of Article 18, the subject matter jurisdiction of the general court-martial is similarly

⁸⁷ Article 18, 10 U.S.C. § 818 (LEXIS through May 5, 2005).

⁸⁸ For a full list of persons subject to the code, see Article 2 of the UCMJ. 10 U.S.C. § 802 (LEXIS through May 5, 2005).

limited to the UCMJ itself. The offenses covered in the first sentence of Article 18 are those contained in Articles 77-134.

Where the first sentence of Article 18 describes general court-martial jurisdiction by reference to the code, the second sentence looks outside the UCMJ to define jurisdiction. In its second sphere of competence, the general court-martial does not operate under the Rules for Courts-Martial and Military Rules of Evidence. Instead, it acts under a different grant of authority—the law of war, allowing for a trial by military tribunals, including military commissions.⁸⁹ The second sentence of Article 18 provides different definitions of personal jurisdiction and subject matter jurisdiction. Instead of trying persons defined by Article 2 of the UCMJ, the general court-martial acting in this second sphere of competence tries persons who are subject to a military tribunal by an application of the laws of war. As for subject matter, the focus is likewise outside of the UCMJ. The second sentence of Article 18 grants authority to the general court-martial in its capacity as a military commission to try offenses cognizable under the laws of war.

The military tribunals referenced in the second sentence of Article 18 differ from courts-martial in their nature, the punishments available to each type of proceeding, and the classes of offenders each forum covers. More than once during the UMCJ hearings, Congress specifically distinguished the jurisdiction and function of a general court-martial from that of a military tribunal.⁹⁰ Congress underscored this distinction by discussing how

⁸⁹ The “military tribunal” is a general term that includes military commissions, occupation courts, and courts of inquiry. See *1949 House Hearings*, *supra* note 23, at 975. In this paper, the term “military tribunal” generally refers to proceedings that do not derive their jurisdiction from the first sentence of Article 18.

⁹⁰ During an article-by-article analysis of the proposed code, the Assistant General Counsel, Office of the Secretary of Defense, explained the second sentence of Article 18:

Well, that [language] is provided, Mr. Chairman, so that a general court martial [sic] can act as a military tribunal if necessary and when it does so act that it will operate under the laws of war. It is a precautionary type of provision. It rarely happens, I take it, but in the event it ever became necessary, that jurisdiction would be provided.

punishments imposed by a court-martial and military tribunal differ.⁹¹ There is no doubt that Congress intended to preserve the two spheres of competence that the general court-martial had long held. What is not clear, however, is whether Congress intended to allow the U.S. service member to be tried by a general court-martial acting under the laws of war and not under the statutory provisions of the UCMJ.

Lawmakers were concerned about the broad scope of the second sentence of Article 18 and the application of military commissions to U.S. service members. The following exchanges from the legislative history highlight two important points in analyzing congressional grants of jurisdiction to general courts-martial. First, these passages provide support to show that, as discussed above, Congress intended to give general courts-martial competence in two areas: one strictly applying the UCMJ as classic military law and one flowing from a separate authorization to exercise military jurisdiction under martial law, a military government, or the laws of war. Second, the general court-martial's additional jurisdiction as a military tribunal was intended to affect U.S. military members differently than other persons subject to military tribunals.

During the hearings, Mr. Felix Larkin, Assistant General Counsel in the Office of the Secretary of Defense, had discussed in general terms how the second sentence in Article 18 would enable the general court-martial acting as a military tribunal to impose punishments under the law of war, including the death penalty. Mr. Larkin implied that, when acting as a military tribunal, a general court-martial would not be constrained by the limitations on punishment imposed either by the UCMJ itself (Articles 77-134) or by the first sentence of Article 18 because the general court-martial would be acting within its second sphere of

1949 House Hearings, supra note 23, at 958 (testimony of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense). *See also infra* note 94 accompanying text.

⁹¹ *See 1949 House Hearings, supra* note 23, at 959.

competence. The military tribunal was in essence free to impose any punishment authorized by the law of war. Colonel John Dinsmore, Office of the Judge Advocate General for the Army, generally agreed, citing an example of the trial of spies and saboteurs and suggesting that under the law of war a military tribunal could impose death penalty. However, he immediately inferred that U.S. military members were excluded from the scope of this rule:

Mr. LARKIN. Well, [the second sentence of Article 18] enables the court-martial then to impose the same kind of punishments that a military tribunal could impose under the laws of war.

Mr. RIVERS. On civilians, too.

Mr. LARKIN. That is right[.]

Mr. BROOKS. Do you interpret that to mean cruel and unusual punishment—any type?

Mr. LARKIN. Well, I do not believe cruel and unusual punishments are permitted under the laws of war.

Can you answer that, Colonel Dinsmore?

Colonel DINSMORE. Those are set out very specifically, Mr. Chairman, in the laws of war. It is well settled what punishment you can adjudge. This is primarily designed for the trial of spies, saboteurs, and people like that, and not military personnel.⁹²

Representative Brooks, concerned that the jurisdiction granted by the second sentence of Article 18 appeared to be “a catch-all that will just about cover anything[.]”⁹³ asked for clarification about whether U.S. service members would be subject to military tribunals:

Mr. LARKIN. [That second sentence] is designed to enable the courts martial [sic], when it is acting not as a courts martial but as a military tribunal, to follow the laws of war.

Mr. BROOKS. Does it not nullify what we just said above there?

Mr. LARKIN. No, because it is used as a military tribunal in only a very limited number of cases, usually a case like spying or treason.

Mr. BROOKS. But it says “any person who by the law of war is subject to trial.” Would that not include any man in any branch of the service?

Mr. LARKIN. Well, any man in any branch of service, I suppose who violated the law of war would be triable by a military tribunal or a courts martial which is not acting as a courts martial but a military tribunal.

Mr. BROOKS. I will not make it a point, but it does just seem to me that covers everybody and it renders null the preceding provision which limits the type of punishment. That is not true, is it?

Mr. LARKIN. I do not think so, Mr. Chairman.

⁹² 1949 House Hearings, *supra* note 23, at 959.

⁹³ *Id.* at 961.

....
Colonel DINSMORE. . . . Now I would like to say . . . I conceive of no situation in which military personnel of our own forces would be tried under the laws of war as distinguished from the Articles of War we are writing.

A classical example of the military tribunal is the trial of the Lincoln conspirators.⁹⁴

It is clear that Congress intended the general court-martial to act in two ways.

Article 18 does not contain language suggesting the primacy of one exercise of general court-martial jurisdiction over the other. Article 21 provides for concurrent jurisdiction between the general court-martial acting as such and a military commission, but history shows that U.S. military members were tried by court-martial over a military commission whenever the statutory military law provided a means for prosecution.⁹⁵

IV. THE MECHANICS OF ARTICLE 134: HOW THE GENERAL ARTICLE WORKS

Under its jurisdictional grant in Article 18, the general court-martial is vested with jurisdiction to try offenses described in the UCMJ, including certain conduct that is not expressly defined in Title 10. From the earliest days, the Articles of War authorized a court-martial to try offenses that were not specifically listed elsewhere in the articles.⁹⁶ This provision handed down from the Articles of War, also known as the general article, appears in the modern UCMJ as Article 134:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces [clause 1 offenses], all conduct of a nature to bring discredit upon the armed forces [clause 2 offenses], and

⁹⁴ *Id.* at 961-62.

⁹⁵ See *supra* notes 79-80, and 86 and accompanying text.

⁹⁶ The fiftieth Article of War was the general article in effect from June 30, 1775:

All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

The general article appears every later version of the Articles of War. AM. ARTS. OF WAR OF 1776, § XVIII, art. 5; AM. ARTS. OF WAR OF 1806, art. 99; AM. ARTS. OF WAR OF 1874, art. 62; ARTS. OF WAR OF 1928, art. 96. These codes through 1874 are reprinted in Winthrop, *supra* note 12, at 953-96. See also note 16 and accompanying text (noting reports of military trials for common crimes during the Revolutionary War period).

crimes and offenses not capital [clause 3 offenses], of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.⁹⁷

Article 134 thus serves as a kind of catch-all for offenses that are not specifically defined as part of codified military law.

The benefit of Article 134 is its flexibility. It is a short article with an enormous impact. There are two types of Article 134 offenses. The first type includes crimes that are defined through the exercise of presidential authority. Article 36 allows the President to prescribe pretrial, trial, and post-trial procedures, including modes of proof,⁹⁸ and he has used this authority to create and define more than fifty criminal offenses within Article 134 itself.⁹⁹ This is how the Manual for Courts-Martial came to contain offenses such as writing bad checks,¹⁰⁰ disorderly conduct,¹⁰¹ and fraternization,¹⁰² among many others.

The second type of Article 134 offense uses the general article to allege crimes that are not specifically listed within the pages of the Manual for Courts-Martial. When a violation is not expressly covered by congressional enactment (Articles 77-133) or by an exercise of presidential authority (offenses listed under Article 134), military practitioners may draft a new specification to allege a violation of the general article.¹⁰³ In these cases, the general article allows prosecutors to charge certain federal crimes (such as violations of the War Crimes Act) and state violations (such as underage drinking laws when committed in the United States) in trials by courts-martial. It also allows prosecutors to reach conduct that

⁹⁷ 10 U.S.C. § 934 (LEXIS through May 5, 2005).

⁹⁸ 10 U.S.C. § 836. For a recent example of the exercise of presidential authority, see Executive Order 13365, Dec. 3, 2004.

⁹⁹ MCM, *supra* note 10, pt. IV, ¶¶61-113. The President's list is neither exhaustive nor exclusive. *Id.*, app. 23, at 17; *United States v. Saunders*, 56 M.J. 930, 933-34 (Army Ct. Crim. App. 2002), *aff'd*, 59 M.J. 1 (C.A.A.F. 2003).

¹⁰⁰ MCM, *supra* note 10, pt. IV, ¶68.

¹⁰¹ *Id.*, ¶73.

¹⁰² *Id.*, ¶83.

¹⁰³ *See id.*, ¶¶60.c(5)(a) and (6)(c).

affects the discipline within the military or its reputation. The result is that the UCMJ, despite its short text, can often accommodate a broad range of law.

When an offense is not defined by Congress or the President, it is considered a non-enumerated offense that falls under one of three clauses contained in the general article.¹⁰⁴ These non-enumerated offenses can be placed into two baskets of crimes: those that are already crimes in their own right *outside* of the military context (clause 3) and those that are criminal offenses *because* of their military context (clauses 1 and 2). Clause 1 describes neglects and disorders that are prejudicial to good order and military discipline, clause 2 offenses are those which are of a nature to bring discredit to the armed forces, and clause 3 allows for the charging of all other non-capital crimes that apply under state or federal law.¹⁰⁵

The proof required for conviction of any clause 1, 2, or 3 offense depends on the nature of the charged misconduct.¹⁰⁶ Under clauses 1 and 2 the proof must establish that 1) the accused did or failed to do certain acts, and 2) that, under the circumstances, the accused's conduct was prejudicial to good order and discipline within the armed forces or was of a nature to bring discredit upon the armed forces.¹⁰⁷ In contrast, when a federal statute is imported under clause 3, the elements of the federal law *become* the elements of the Article 134 offense; the proof must establish every element of the offense as required by the imported law.¹⁰⁸

¹⁰⁴ *Id.*, ¶60.c(1).

¹⁰⁵ Certain violations of state law can be assimilated into federal jurisdiction and into Article 134 through the application of the Assimilative Crimes Act, 18 U.S.C. § 13. MCM, *supra* note 10, pt. IV, ¶60.c(4)(c)(ii). This paper does not analyze the applicability of state crimes under the UCMJ and does not discuss the Assimilative Crimes Act in detail. Where court opinions frequently use the word "assimilate" to describe the incorporation of either federal or state law into Article 134, this paper will use the word "import" or "incorporate" to describe the application of federal criminal statutes to Article 134.

¹⁰⁶ MCM, *supra* note 10, pt. IV, ¶60.b.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

A. Clause 3 Offenses: Importing Crimes from Federal Law

Clause 3 offenses are those that already constitute criminal violations outside of the military. They are distinct from clause 1 and 2 offenses in three ways. First, because a federal crime is completely imported as a clause 3 offense, each element of the federal statute must be alleged expressly or by necessary implication.¹⁰⁹ Second, not every federal statute is eligible to be imported in every circumstance. Practitioners must be aware of the territorial jurisdiction of the federal statute when drafting clause 3 charges. Some federal statutes have worldwide application,¹¹⁰ others do not.¹¹¹ The imported federal law must apply at the location where the offense occurs,¹¹² or the court-martial will lack subject matter jurisdiction to try the clause 3 offense.¹¹³ (See Figure 1.) Finally, Article 134 was not intended to provide a streamlined procedure for charging every violation that is codified in a law. Foreign laws are excluded from the definition of “crimes not capital,” and may not be incorporated through clause 3.¹¹⁴

¹⁰⁹ *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982); MCM, *supra* note 10, pt. IV, ¶60.c(6). Failure to allege every element can be fatal to the charge. The *Mayo* court used fairly strong language to get its point across: “A specification fatally flawed because it does not contain an allegation of fact essential to proof of the offense charged is not restored to legal life by the government’s production at trial of evidence of the fact.” *Id.* The imported statute should be identified, but this is more a recommendation than a directive; failure to identify the federal statute is not fatal to the specification. *Mayo*, 12 M.J. at 289; MCM, *supra*, pt. IV, ¶60.c(6).

¹¹⁰ One example cited in the Manual for Courts-Martial is counterfeiting. MCM, *supra* note 10, pt. IV, ¶60.c(4)(b). Another example is the War Crimes Act, 18 U.S.C. § 2441 (LEXIS through May 5, 2005).

¹¹¹ For example, the federal anti-torture statute limits its jurisdiction to acts that occur outside of the United States, its possessions, commonwealths, and territories. 18 U.S.C. § 2340(3) (LEXIS through May 5, 2005).

¹¹² MCM, *supra* note 10, pt. IV, ¶60.c(4)(c)(i).

¹¹³ *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984). The offense will lack subject matter jurisdiction because the conduct will not technically constitute a “crime” at that location if the statute lacks territorial application. This highlights the distinction between clause 3 offenses and offenses under clauses 1 and 2—clause 3 covers “crimes and offenses” found in the civilian legal systems, and not merely disorders that are unique to military society.

¹¹⁴ MCM, *supra* note 10, pt. IV, ¶60.c(4)(a).

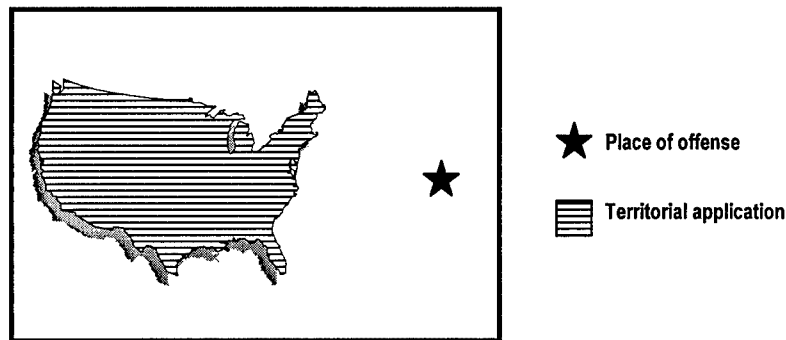


Figure 1. *Territorial application is a prerequisite to importing an offense under clause 3:* When the territorial application of a federal statute (shown with horizontal lines) is limited to confines of the United States, only those offenses that occur *within* that territory may be prosecuted under federal law. These federal crimes of local application may be charged under clause 3 of Article 134 of the UCMJ. However, when an offense occurs *outside* of the area where the federal statute applies (shown above by a star), the federal statute lacks local application and may not be imported under clause 3. However, despite the bar to direct importation under clause 3, the federal statute may form the basis of a clause 1 or 2 offense under Article 134 (discussed below in subsection B).

These clause 3 features, however, do not necessarily limit the military's overall ability to prosecute an offense. If the conduct itself is detrimental to military discipline or the reputation of the armed forces, clause 1 or 2 may provide an avenue for charging substantially similar misconduct.¹¹⁵

In the context of offenses that occur during armed conflicts, one statute that is foreseeable as an imported offense under clause 3 of Article 134 is the War Crimes Act. This statute criminalizes, among other conduct, grave breaches of the Geneva Conventions.¹¹⁶ By the express language of the statute, its territorial application is worldwide¹¹⁷ and thus on its face will always satisfy the clause 3 prerequisite of local application. Barring any other jurisdictional obstacles,¹¹⁸ the War Crimes Act could be imported as an Article 134, clause 3 offense to prosecute conduct of a U.S. military member that takes place anywhere on the globe. Another federal law discussed in connection to the ongoing operations in Afghanistan

¹¹⁵ See subsection B, *infra*.

¹¹⁶ 18 U.S.C. § 2441(c).

¹¹⁷ In one of the clearest statements of unlimited territorial application, section 2441(a) is applicable "whether inside or outside the United States"

¹¹⁸ The impact of federal capital crimes on the jurisdiction of a court-martial is discussed *infra* in Section V.A.

and Iraq¹¹⁹ is the statute implementing the Convention Against Torture.¹²⁰ The anti-torture statute criminalizes conduct that occurs outside of the United States and the District of Columbia, the commonwealths, territories, and possessions of the United States.¹²¹ Because the reach of the statute is aimed at locations abroad, this statute may also be imported under clause 3 when an offense occurs in a foreign theater of operations.

B. Clause 1 and 2 Offenses: The Crimes of Disorder and Discredit

Clause 1 and 2, describing the uniquely military “disorder” and “discredit” offenses under the general article, can be applied in two ways. First, these clauses can be used to form the basis of standalone charges. And, as case law demonstrates, clause 1 and 2 offenses can also be used as lesser included offenses of clause 3 offenses.

1. As Charged Offenses

Disorders and neglects that prejudice military discipline or erode the reputation of the U.S. armed forces may be charged as standalone offenses under clauses 1 and 2. Although the language of the general article is broad, the Supreme Court held that it was not so vague that military members could not understand what conduct was prohibited.¹²² Decisions from military courts of appeal and examples contained in the Manual for Courts-Martial have shaped the scope of Article 134.¹²³

Clause 1 and 2 offenses encompass two theories of criminality. First, clause 1 and 2 violations may be based on state or foreign law, but proof of a violation of that state or

¹¹⁹ See, e.g., Association of the Bar of the City of New York, *Human Rights Standards Applicable to United States' Interrogation of Detainees*, 59 THE RECORD 271 (2004).

¹²⁰ 18 U.S.C. §§ 2340-40B (LEXIS through May 5, 2005).

¹²¹ 18 U.S.C. §§ 2340(3) and 2340A(a).

¹²² *Parker v. Levy*, 417 U.S. 733, 756-57 (1974).

¹²³ *Id.* at 753-54.

foreign law does not create a *per se* violation under clause 1 or 2 of Article 134.¹²⁴ Acts that are generally recognized by society as illegal tend to create the discredit to the service or the prejudice to military discipline *because of their unlawful nature*.¹²⁵ Therefore, the violation of the state or foreign law is only one factor in determining whether the military member's conduct was prejudicial to good order and discipline or service discrediting.¹²⁶ Second, clause 1 and 2 offenses cover acts affecting the military that “—however eccentric or unusual—would not be viewed as criminal outside of the military context.”¹²⁷ Conduct under this second theory *becomes* unlawful in the military *because of its effect* on internal discipline or the reputation of the service.¹²⁸

To qualify as a clause 1 offense, an act must be *directly* prejudicial to good order and discipline.¹²⁹ For example, a breach of a military custom may constitute a clause 1 offense,

¹²⁴ *United States v. Sadler*, 29 M.J. 370, 374-75 (C.M.A. 1990). The court was particularly concerned that without appropriately tailored instructions from the military judge, a service member would be found guilty of the Article 134 offense solely because of the violation of state or foreign law. *Id.* at 375. Conduct can be service discrediting regardless of whether or not it consists of a violation of local laws. As such, it is not necessary to include a reference to the state or foreign law in a clause 1 or 2 specification, and such a reference could be unhelpful if it requires the government to present evidence on additional elements. See *United States v. Vines*, 57 M.J. 519, 527 (C.A.A.F. 2002).

¹²⁵ *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988). See also *United States v. Holt*, 23 C.M.R. 81 (C.M.A. 1957) (cheating at calling out bingo numbers and splitting the prize with the winners was prejudicial to good order within the military).

¹²⁶ *U.S. v. Sadler*, 29 M.J. at 375.

¹²⁷ *U.S. v. Davis*, 26 M.J. at 448.

¹²⁸ *Id.* (although not illegal under any civilian statute and despite a gender-identity disorder, the wear of women's clothing and makeup by a male sailor on a military installation was sufficiently criminal under clause 1 due to the prejudice to good order and discipline). See also *United States v. Sadinsky*, 34 C.M.R. 343, 346 (C.M.A. 1964) (holding that jumping from an aircraft carrier on a wager, although not specifically prohibited, was directly inimical to good order and discipline); *United States v. Sanchez*, 29 C.M.R. 29 (C.M.A. 1960) (bestiality was not a local crime *per se*, but sex with a chicken was an indecent act that was of a nature to tarnish the reputation of the service); *United States v. Blevens*, 18 C.M.R. 104 (C.M.A. 1955) (membership or an affiliation with a group advocating violence overthrow of the U.S. government was “definitely discrediting to the armed forces”).

¹²⁹ “Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects.” MCM, *supra* note 10, pt. IV, ¶60.c(2)(a). See, e.g. *United States v. Herron*, 39 M.J. 860 (N.-M.C.M.R. 1994) (mere use of profanity *per se* or language that the listener finds offense does not constitute an offense under Article 134); *United States v. Henderson*, 32 M.J. 941 (N.-M.C.M.R. 1991), *aff'd*, 34 M.J. 174 (C.M.A. 1992) (finding evidence insufficient at trial that private sexual intercourse between the appellant recruiter and high school students of consenting age, although morally reprehensible, constituted an Article 134 offense; at the time

but the custom alleged must be more than frequently occurring behavior or a procedural method.¹³⁰ “Custom arises out of long established practices which by common usage have attained the force of law in the military”¹³¹ Of course, the custom itself must be lawful, and customs that have been more formally incorporated into regulations should be charged as a dereliction of duty under Article 92 instead of under the general article.¹³²

Where clause 1 punishes conduct that internally affects military discipline and order, clause 2 punishes conduct that may affect how others view the armed forces. For the conduct to be criminal under clause 2, it must be of a nature to tarnish the reputation of the service.¹³³ To satisfy the due process requirement of fair notice that the conduct is of the type that may bring discredit to the U.S. military, courts may draw on a variety of sources and consider federal and state laws as well as military law, including the Manual for Courts-Martial, case law, customs and usage, and regulations.¹³⁴

It is not necessary to expressly specify whether the conduct was a disorder or whether it was of a nature to bring discredit to the armed forces,¹³⁵ but omission the element of

custom, regulations, and local laws did not prohibit the conduct); *United States v. Wilson*, 32 C.M.R. 517, 518 (C.M.R. 1962) (sexual intercourse between unmarried persons, absent any aggravating circumstances, is not an offense under the UCMJ).

¹³⁰ MCM, *supra* note 10, pt. IV, ¶60.c(2)(b).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*, ¶60.c(3).

¹³⁴ *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003). In this case, the appellant challenged her guilty plea, claiming that child neglect (leaving a 47-day-old baby at home alone for six hours) that did not harm to the child was not a UCMJ offense. Because the crime occurred overseas, the military could not assimilate any state offense under clause 3, however, the court of appeals found that statutes describing neglect in more than half of the states coupled with military case law and military regulations were sufficient to satisfy fair notice and support a clause 2 conviction. *Id.*

¹³⁵ Sometimes conduct can constitute more than one type of Article 134 offense. MCM, *supra* note 10, pt. IV, ¶60.c(6)(a).

wrongfulness, i.e., prejudicial or service discrediting conduct, may be fatal to a clause 1 or 2 specification.¹³⁶

2. Using Clause 1 and 2 Offenses as Lesser Included Offenses of Clause 3

Clause 1 and 2 offenses can also be considered lesser included offenses of a crime charged under clause 3 of Article 134. If a clause 3 specification was inartfully drafted,¹³⁷ if the evidence at trial is lacking to support an element,¹³⁸ or if there was a challenge to constitutionality of the statute that renders an element invalid,¹³⁹ developing the facts that support clause 1 and 2 may allow for a conviction of the lesser included offense.¹⁴⁰

However, if the prosecution bases its theory solely on clause 3 “and the case was submitted to the trier of fact solely on that premise, then appellate courts will not affirm an included offense under the first or second clauses” even though the lesser offenses are otherwise generally authorized.¹⁴¹ Because the government carries the burden of proving every element of every offense, prosecutors establishing clause 3 offenses should consider it part of

¹³⁶ See *United States v. Regan*, 11 M.J. 745, 746 (A.C.M.R. 1981) (dismissing an offense charged under clause 1 or 2 because the specification alleging that the accused threw butter on the ceiling of the mess hall failed to include words importing criminal intent).

¹³⁷ *United States v. Mayo*, 12 M.J. 286, 287-89, 294 (C.M.A. 1982) (upholding a finding of guilt on a lesser included offense under clause 1 when, although the clause 3 specification omitted a necessary element, sufficient evidence was presented at trial and the jury received instruction on conduct prejudicial to good order and discipline).

¹³⁸ *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984) (declining to uphold a clause 3 offense because proof was insufficient to show that the offense occurred within the jurisdiction of the imported federal kidnapping statute). At trial, the military judge instructed the panel that prejudice to good order and discipline or service discredit was an element of the offense. *Id.* at 210. As a clause 3 offense, this element was unnecessary, but it would have been an essential element of a clause 1 or 2 offense. *Id.* at 216. Although the military judge did not specifically instruct the court-martial panel on the availability of a finding of guilt on a lesser included offense, the fact that he had provided instruction about prejudice to discipline or service discredit allowed the court to affirm a finding of guilty under the first two clauses. *Id.* at 217-18.

¹³⁹ The Supreme Court decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), affected the appellate review of military cases that relied on the definition of unconstitutionally broad definition of child pornography. See, e.g., *United States v. Anderson*, 60 M.J. 548 (A.F. Ct. Crim. App. 2004), *rev. denied*, 60 M.J. 403 (C.A.A.F. 2004); *United States v. Irvin*, 60 M.J. 23 (C.A.A.F. 2004).

¹⁴⁰ *United States v. Perkins*, 47 C.M.R. 259 (A.F.C.M.R. 1973). See also *United States v. Gould*, 13 M.J. 734 (C.M.R. 1982) (upholding a finding of guilt as a lesser included offense under clauses 1 and 2 of Article 134 for drug use—before Article 112a was enacted—because sufficient evidence was developed at trial, the parties acknowledged the lesser offense, and the military judge provided relevant instructions).

¹⁴¹ *U.S. v. Gould*, 13 M.J. at 739.

their trial preparation to include evidence of service discredit or impact to good order and discipline to preserve the possibility of conviction of a clause 1 or clause 2 lesser included offense, whenever the facts of the case permit it.¹⁴²

V. THE LIMITATIONS OF ARTICLE 134: HOW CAPITAL PUNISHMENT AVAILABLE UNDER THE FEDERAL STATUTE AFFECTS MILITARY PROSECUTIONS

As a further limitation on the scope of the UCMJ's general article, capital offenses may not be charged under any clause of Article 134.¹⁴³ Although clause 3 contains the reference to "crimes and offenses not capital," the restriction of the general article to only non-capital crimes has been found to apply to all three clauses of the general article. This stems from *United States v. French*,¹⁴⁴ in which the court wrestled with the interpretation and application of the words "crimes and offenses not capital."

A. U.S. v. French: Civil Statutes Authorizing the Death Penalty Fall Outside of the Scope of the General Article

Captain French was charged with a violation of Article 134 for attempting to communicate national defense secrets from New York and Washington D.C. for use by the Soviet Union.¹⁴⁵ It was unclear from the trial record which clause of Article 134 applied.

¹⁴² Two cases that involved a set aside of clause 3 offenses in the wake of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, had different outcomes on appeal. Compare *United States v. O'Connor*, 58 M.J. 450, 454 (C.A.A.F. 2003), *aff'd*, 60 M.J. 118 (C.A.A.F. 2003), and *reh'g granted*, 60 M.J. 119 (C.A.A.F. 2004) (declining to find a plea of guilty provident on a clause 2 lesser included offense because, although the appellant stipulated to service discrediting character of his conduct, there was no discussion of this element during the guilty plea inquiry) with *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) (finding that the military judge's discussion of service discrediting and prejudicial conduct rendered the appellant's guilty plea provident with respect to the lesser included offense). Where a trial is before a military judge alone, the prosecution still carries the burden of proving the elements of clause 1 and 2 offenses either by developing the evidence, ensuring coverage of clause 1 and 2 elements during a guilty plea inquiry or, at a minimum, incorporating the requisite elements as part of the theory of the case. *United States v. Gallo*, 53 M.J. 556, 566-67 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 418 (C.A.A.F. 2001).

¹⁴³ MCM, *supra* note 10, pt. IV, ¶60.c(5)(b).

¹⁴⁴ *United States v. French*, 27 C.M.R. 245 (C.M.A. 1959). The analysis of the punitive articles lists *French* as the case which established the rule listed in paragraph 60.c(5)(b) of the Manual for Courts-Martial. MCM, *supra* note 10, app. 23, at 17.

¹⁴⁵ 27 C.M.R. at 250.

The specification did not include reference to a federal statute or the element alleging that the conduct was service discrediting or prejudicial to good order and discipline.¹⁴⁶ Captain French asserted that the charge imported an offense under clause 3 from the federal Espionage Act and, because the underlying offense was capital, the military lacked jurisdiction.¹⁴⁷ The government argued that because the charge made no specific reference to a federal statute, it properly alleged serious misconduct under clause 2; because it was not an imported offense, the court-martial had jurisdiction over the offense.¹⁴⁸ The appellate court partially agreed with both sides. It found that the specification alleged a violation under clause 2, but disagreed that the court-martial had jurisdiction over the offense.¹⁴⁹ Based on the elements alleged in the specification, the court ultimately found that the charged conduct described a clause 2 violation of the federal Espionage Act, an offense which carried the death penalty.¹⁵⁰ As a civil capital offense, the violation alleged was beyond the reach of Article 134 under any of its clauses. (See Figure 2.)

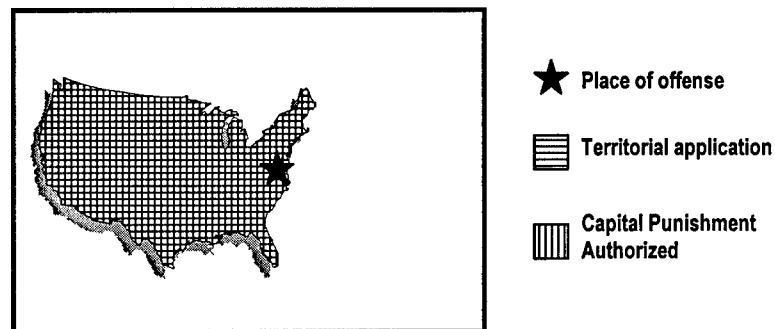


Figure 2. Despite a statute's territorial applicability, the capital nature of the federal crime bars prosecution in courts-martial: The intersecting lines in this figure represent the area in which

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 249-50.

¹⁴⁸ *Id.* at 250.

¹⁴⁹ 27 C.M.R. at 250.

¹⁵⁰ *Id.* at 252. The court noted that the specification, if drafted differently, could have described a violation of the Atomic Energy Act, which was a non-capital offense carrying a maximum confinement penalty of ten years. *Id.* Had this charge reflected a violation of the Atomic Energy Act, the court would not have dismissed the charge for lack of jurisdiction, because the underlying offense would have been non-capital. At that time, the UCMJ did not contain Article 106a.

military authorities are precluded from using the UCMJ's general article to charge a federal capital offense. When the offense (shown by a star) occurs within the territorial application of a federal statute (shown with horizontal lines), it has met the first prerequisite for use in a trial by court-martial under Article 134 of the UCMJ. The second prerequisite under the general article allows prosecutions only for *non-capital* offenses. When capital punishment might be authorized for a federal crime (shown with vertical lines) at the place where the crime occurred (shown by a star), this second prerequisite is not met and the federal criminal statute may not be used to charge *any* offense under the general article.

To support its conclusion that the capital nature of the offense deprived the court-martial of jurisdiction under all three clauses, the court traced the history of Article 134 back to the British Code of James II of 1686¹⁵¹ and compared the language to the fiftieth Article of War of 1775.¹⁵² The court found that the general article in the Code of James II allowed trial for *any* offenses but prohibited a *sentence* that included capital punishment where, in contrast, “the Article of War denies to American military courts jurisdiction to entertain capital cases under what has become known as the general Article.”¹⁵³ The court relied heavily on Colonel William Winthrop’s *Military Law and Precedents* for more than historical guidance and completely adopted one particular passage as part of its legal opinion and rationale:

“*Not Capital.*” The Article, by these words, expressly excludes from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death by the common law, or by a statute of the United States applicable to the case,—as, for example, murder, arson, or rape.

¹⁵¹ Article LXIV of the Code of James II allowed for prosecution of all misdemeanors, faults, and disorders not otherwise specified in the code, “Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War.” *French*, at 250, citing WINTHROP, *supra* note 12, at 928.

¹⁵² 27 C.M.R. at 250, citing WINTHROP, *supra* note 12, at 957. For the text of the fiftieth article, see *supra* note 96.

¹⁵³ *French*, at 250. Curiously, the court of appeals made no reference to the British Articles of War of 1765, which also appear in Winthrop’s book, and which include an article in section XX that is identical in language to the fiftieth Article of War of 1775. Winthrop, *supra* note 12, at 946. Reference to the British Articles of War of 1765 would have shown that Britain departed from the sentence limitation principle before the Americans adopted their Articles of War from the British, and it would have shown that the American Articles of War were actually *similar* to the most current British Articles of War. However, this omission is not a fatal flaw in the court’s reasoning. Regardless of when and where the language cited by the *French* court first appeared, it still supports the argument that the newer clause intended to abandon the sentence limitation in favor of the bar to subject matter jurisdiction when the underlying offenses are capital.

The exclusion being absolute, the capital crime, however nearly it may have affected the discipline of the service, cannot be any more legally adjudicated *indirectly* than *directly*.¹⁵⁴

Where the earlier British law allowed the charging of any civil offense as long as the punishment in the military trial did not include death, the *French* court rejected the argument that the “crimes and offenses not capital” language served as a sentencing limitation. Instead, the court found that the general article and its predecessors were intended to preclude trials of civil capital offenses unless specifically authorized by Congress. As further support, the *French* court also considered the practice of denying military courts the power to impose the death penalty unless it was specifically authorized.¹⁵⁵

The *French* court found the jurisdictional limitations were applicable to all three general article clauses based on a two-part rationale. First, military legal history showed that “Congress has denied to military courts the power to try capital offenses which are civilian in nature and which can be tried by civilian courts.”¹⁵⁶ But this limitation on military jurisdiction does not bind the hands of the U.S. government. The statutes are imported under clause 3 from federal law; lack of court-martial jurisdiction does not deprive the U.S. federal government of the ability to prosecute the offense in a federal court under federal law. Second, treating clauses 1 and 2 differently from clause 3 would create a bypass around the limitations Congress placed in the general article. Allowing a capital offense that is barred under clause 3 to be prosecuted as a non-capital violation of clause 2 would render the “noncapital” limitation meaningless because it would “permit[] the Government to proceed

¹⁵⁴ 27 C.M.R. at 251, *citing* WINTHROP, *supra* note 12, at 721-22.

¹⁵⁵ The court noted that general courts-martial first were expressly authorized in 1863 to impose the death penalty for the civilian capital offenses of rape and murder, but only if the offenses occurred during war time. *French*, at 251. *See supra* note 73. Prior to the enactment of the UCMJ, military courts lacked jurisdiction to trying offenses committed within the United States in peacetime. 27 C.M.R. at 251. Finally, the court cited Articles 18 and 52, to demonstrate that the UCMJ “unquestionably den[ies] to general courts-martial the power to impose the death sentence except when specifically authorized by the Code.” *French*, at 251.

¹⁵⁶ *Id.* at 252.

indirectly when it is barred from advancing directly.”¹⁵⁷ Therefore, the court ruled that Article 134, under all clauses and as currently drafted, raises an “absolute barrier against military courts trying peacetime offenses which permitted the imposition of the death penalty in civilian courts.”¹⁵⁸

B. Bypassing the General Rule: Crimes Occurring Outside a Statute’s Territorial Jurisdiction Are Not Affected by *U.S. v. French*

Shortly after *French* was decided, the courts were faced with determining whether Article 134’s jurisdictional limitation on charging capital offenses operated in areas outside of the territorial application of federal statute. In *United States v. Northrup*, the accused was found guilty of violating Article 134 by attempting to deliver a top secret document to a foreign government.¹⁵⁹ As in *French*, this offense was based on the Espionage Act, which authorized the death penalty.¹⁶⁰ However, unlike in *French*, the location of the crime was overseas,¹⁶¹ where the federal statute lacked application.

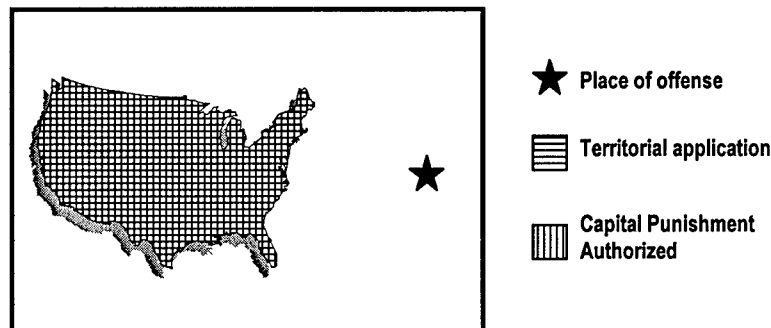


Figure 3. When a crime occurs in an area where the federal statute is non-operative, there is no jurisdictional bar under the general article: The intersecting lines in this figure represent the area in which military authorities are precluded from using the UCMJ’s general article to charge a federal capital offense. Because the crime (shown by a star) was committed overseas, neither

¹⁵⁷ *Id.* at 251. The court further explained that if the language of Article 134 were viewed as a sentence limitation rather than a jurisdictional bar, this interpretation “would also render subsection (3) meaningless and would widen the sweep of military jurisprudence beyond the intent of Congress and the limitations of the Code.” *Id.* at 252.

¹⁵⁸ *Id.* at 252-53.

¹⁵⁹ 31 C.M.R. 599, 601 (A.F.B.R. 1961).

¹⁶⁰ *Id.* at 606.

¹⁶¹ *Id.* at 602.

the territorial jurisdiction of the federal statute (shown with horizontal lines) nor its capital punishment provisions (shown with vertical lines) directly apply (compare with Figure 2). Unlike the situation described in Figure 2, here the federal statute lacks territorial application at the location where the crime occurred, which means that the federal statute and its elements may not be imported under clause 3 of Article 134. However, the *behavior* criminalized by the federal statute can be used as a basis of an offense charged under clauses 1 or 2 (as in *U.S. v. Northrup*).

The *Northrup* court acknowledged that, under the ruling in *French*, the military would not have jurisdiction to try an accused for a capital offense which was committed “in an area where the federal civilian courts can operate.”¹⁶² However, where the charged offense does not invade the province of the civilian courts, a military court-martial may have jurisdiction over the offense. (See Figure 3.) The court reasoned that because the statute was non-operative where the crime was committed, the province of the civilian court was unaffected, and the offense could be tried by court-martial.¹⁶³

This is where the distinction between clause 3 offenses and offenses under clauses 1 and 2 is most important. Applying the holding in *Northrup*, there is be no applicable federal statute to import under clause 3,¹⁶⁴ but the illegal nature of the conduct proscribed by the federal law provides the foundation for charging a violation of clause 1 or 2.

VI. HOW THE ARTICLE 134 CAPITAL PUNISHMENT BAR AFFECTS PROSECUTIONS OF FEDERAL CRIMES: A LOOK AT TWO FEDERAL CRIMINAL STATUTES

A. The War Crimes Act

1. Statutory Definitions and Legislative History

The bill that evolved to become law as the War Crimes Act of 1996 was inspired by a Navy pilot who spent six years in the Hanoi Hilton as a prisoner of war.¹⁶⁵ Opening the

¹⁶² *Id.* at 606.

¹⁶³ *Id.*, citing *U.S. v. French*, 27 C.M.R. at 253.

¹⁶⁴ MCM, *supra* note 10, pt. IV, ¶60.c(4)(c)(i); see *supra* notes 112-113 and accompanying text.

¹⁶⁵ *War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims*, 104th Cong. 5-6 (1996) [hereinafter *War Crimes Act Hearings*] (statement of Rep. Lamar Smith). House Bill 2587 was the predecessor bill to House Bill 3680, which was enacted into law on August 21, 1996, as the War Crimes Act of 1996. H.R. REP. NO. 104-698, at 9 (1996), reprinted in 1996 U.S.C.C.A.N. 2166, 2174.

hearings on the bill, the sponsor announced the legislation's two-fold purpose: to implement the Geneva Conventions and to protect Americans, particularly members of the U.S. armed forces.¹⁶⁶

The current text of the War Crimes Act¹⁶⁷ criminalizes certain offenses committed by or against any United States national¹⁶⁸ or member of the United States armed forces¹⁶⁹ anywhere in the world.¹⁷⁰ The term "war crime" is further described as conduct that is either a violation of common Article 3 or a grave breach of the Geneva Conventions or conduct that is prohibited by other treaties listed in the statute.¹⁷¹ The penalty for violating the War

¹⁶⁶ *War Crimes Act Hearings*, *supra* note 165, at 2 (statement of Rep. Smith). See also H.R. REP. NO. 104-698, at 1, 1996 U.S.C.C.A.N. 2166. The text of the obligations referred to in the House Report may be found in Geneva Convention I, *supra* note 5, art. 49; Geneva Convention II, *supra* note 5, art. 50; Geneva Convention III, *supra* note 5, art. 129; Geneva Convention IV, *supra* note 5, art. 146.

¹⁶⁷ 18 U.S.C. § 2441 (LEXIS through May 5, 2005).

¹⁶⁸ 18 U.S.C. § 2441(b). U.S. nationality is defined by section 101 of the Immigration and Nationality Act, 8 U.S.C. § 1101. Although 18 U.S.C. sec. 2441(b) section covers crimes committed in which a United States armed forces member or national is a victim, this paper focuses on the situation in which a United States military member is accused of crimes committed during an armed conflict.

¹⁶⁹ Initially, the legislation aimed at closing a gap in federal legislation to allow United States prosecution of foreign nationals who commit crimes against service personnel. *War Crimes Act Hearings*, *supra* note 165, at 5 (statement of Rep. Walter B. Jones). The original House Bill 2587 was silent about the nationality of the perpetrator and proposed penal sanctions for grave breaches of the Geneva conventions where the *victim* was either a member of the United States armed forces or a citizen of the United States. *Id.* at 2. The Department of State advocated expansion of the bill, stating "we also have an interest in having the authority, if necessary, to prosecute any U.S. national or armed service member who commits such acts." *Id.* at 10 (testimony of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State). A later bill during the 104th Congress, House Bill 3680, expanded the scope of jurisdiction to cover United States nationals and service personnel who commit war crimes.

¹⁷⁰ 18 U.S.C. sec. 2441(a) both expansively and clearly intended jurisdiction to be of universal territorial application by proscribing war crimes committed "inside or outside of the United States . . ."

¹⁷¹ 18 U.S.C. sec. 2441(c) defines war crimes as conduct:

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

When the War Crimes Act was initially enacted, subsection (a) criminalized a "grave breach of the Geneva Conventions" instead of war crimes, and subsection (c) contained a much shorter definition: "As used in this

Crimes Act includes imprisonment for a term of years or life.¹⁷² Capital punishment is authorized when the victim's death results from conduct prohibited by the statute.¹⁷³

After the U.S. ratified the Geneva Conventions in 1955, the Eisenhower administration declined to implement specific legislation into U.S. domestic law. Instead, it expressed the view that existing law would provide an adequate means to prosecute grave breaches of the Geneva Conventions and found it unnecessary to enact specific implementing legislation.¹⁷⁴ By 1996, however, Congress found that the patchwork of legislation regarding war crimes was substantively and jurisdictionally incomplete, making prosecution impossible in certain circumstances.¹⁷⁵ For example, conduct that could constitute a grave breach of the conventions—torture, hostage-taking, use of weapons of mass destruction, terrorism, and genocide—were already proscribed by federal statutes.¹⁷⁶ However, the killing of a prisoner of war was not.¹⁷⁷ One area where Congress believed that jurisdiction was lacking was in prosecuting former military members who had committed war crimes while on active duty. Although the UCMJ provided an avenue to prosecute U.S. military members, members of an enemy's armed force, and others, the state of the law as of 1996 did not allow prosecutions of a military member once he or she had left the service.¹⁷⁸

section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to any such convention, to which the United States is a party." Pub. L. No. 104-192, 110 Stat. 2104 (1996). In 1997, Congress amended the War Crimes Act to expand the number and scope of crimes that would subject a person to criminal penalties. H.R. REP. NO. 105-204, at 2-5 (1997). No new hearings were held on the 1997 amendment; instead, the 1998 House Report referred to the hearings on the original bill. *Id.* at 7.

¹⁷² 18 U.S.C. § 2441(a).

¹⁷³ *Id.*

¹⁷⁴ *War Crimes Act Hearings*, *supra* note 165, at 9 (statement of Michael J. Matheson); H.R. REP. NO. 104-698, at 3-4 (1996), 1996 U.S.C.C.A.N. 2168-69, *citing* "Geneva Conventions for the Protection of War Victims: Report of the Comm. on Foreign Relations," S. EXEC. REP. NO. 84-9, at 27 (1955).

¹⁷⁵ H.R. REP. NO. 104-698, at 4-5, 1996 U.S.C.C.A.N. 2169-70.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 5, 1996 U.S.C.C.A.N. 2170

¹⁷⁸ *Id.* Although Article 2 of the UCMJ allows for extensive jurisdiction over a variety of persons, including active duty and reserve service members, prisoners of war, and retirees; it does not provide jurisdiction over

Congress was aware of at least one alternative to try war criminals: the use of military commissions. The hearings reveal that the original impetus for the bill was the desire for accountability over foreign nationals who commit war crimes against United States service personnel abroad.¹⁷⁹ Although international criminal tribunals and military commissions were considered as possible means to try perpetrators for grave breaches of the Geneva Conventions,¹⁸⁰ the administration felt that conflict-specific international tribunals were inadequate as the sole or primary means of accountability.¹⁸¹ Instead, the proposed law would “establish clear jurisdiction” to directly prosecute war criminals in U.S. federal court.¹⁸² This, in turn, would also provide an American perpetrator the procedural protections of the U.S. domestic judicial system.¹⁸³ While not foreclosing possibility of using a military commission under the right circumstances, the legislative history reflects unease with the general idea of a trial by military commission.¹⁸⁴

The DoD supported the War Crimes Act, noting that “the United States, as a political matter, should be seen as fully in conformity with its international obligations in this very

members of the military who are properly discharged from the military with no further service obligations. The Military Extraterritorial Jurisdiction Act of 2000 now allows the United States to exercise of jurisdiction over a former military member who has separated from the service, but only if the crimes were discovered after the person left the service. 18 U.S.C. §§ 3261-67 (LEXIS through May 5, 2005).

¹⁷⁹ *War Crimes Act Hearings*, *supra* note 165, at 5 (statement of Rep. Walter B. Jones, referencing treatment of a Blackhawk pilot shot down in Somalia) and 17 (statement of John H. McNeill, Office of General Counsel, Department of Defense, describing maltreatment of U.S. service members by Iraq during the first Gulf War).

¹⁸⁰ *Id.* at 5 (statement of Rep. Jones).

¹⁸¹ *Id.* at 9 (statement of Michael J. Matheson).

¹⁸² *Id.*

¹⁸³ 142 CONG. REC. H8620-21 (1996); H.R. REP. NO. 104-698, at 7, 1996 U.S.C.C.A.N. 2172: “The ability to court martial members of our armed forces who commit war crimes ends when they leave military service. H.R. 3680 would allow for prosecution even after discharge. This may not only be in the interests of the victims, but also of the accused. The Americans prosecuted would have available all the procedural protections of the American justice system. These might be lacking if the United States extradited the individuals to their victims home countries for prosecution.”

¹⁸⁴ H.R. REP. NO. 104-698 at 5-6, 1996 U.S.C.C.A.N. 2170-71. “Many gaps in federal law relating to the prosecution of individuals for grave breaches of the Geneva conventions could *in principle* be plugged by the formation of military commissions. However, the Supreme Court condemned their breadth of jurisdiction to uncertainty in *Ex Parte Quirin*, where it stated that ‘[w]e have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the laws of war.’” *Id.* at 6, 1996 U.S.C.C.A.N. 2171, *citing Quirin*, 317 U.S. 1, 45-46 (1942).

sensitive area.”¹⁸⁵ Regarding U.S. military members who commit war crimes, Congress was also aware of DoD’s preference for and practice of using trials by courts-martial when U.S. service members violate the laws of war:¹⁸⁶

Violations of the laws and customs of war by [U.S. military] members during armed conflict ordinarily would be investigated and prosecuted as violations of the Uniform Code of Military Justice, and the accused members would be subject to trial and punishment by a court-martial. While charges and specifications against an accused normally would not specify that the accused is charged with a “war crime,” nevertheless, the accused would be prosecuted for crimes specified, for example, as “grave breaches” of the Geneva Conventions of 1949. Such violations could include murder (Article 118, UCMJ), and rape (Article 120, UCMJ), waste destruction or spoilage of non-U.S. Government property (Article 109, UCMJ), or extortion (Article 127, UCMJ).¹⁸⁷

Noticeably absent in the hearings was commentary about the need to adjust the UCMJ in the face of federal legislation that created the new domestic offense of war crimes and authorized a maximum penalty that would often be more severe than what the UCMJ allows. For example, although the UCMJ offenses of rape and murder authorize maximum punishments in the military system that correspond to federal maximum penalties, the other “war crimes” specifically mentioned by the DoD testimony carry significantly lower maximum punishments.¹⁸⁸ Despite the reference to war crimes as “the most heinous crimes

¹⁸⁵ *War Crimes Act Hearings*, *supra* note 165, at 18 (testimony of John J. McNeill).

¹⁸⁶ The House Report cited the trial of Lieutenant William Calley as the “most famous example of a court martial for war crimes.” H.R. REP. NO. 104-698, at 5, 1996 U.S.C.C.A.N. 2170. Although the conduct for which he was convicted of is often referred to as war crimes, he was charged with the UCMJ common crimes of premeditated murder (Article 118) and assault with intent to commit murder (Article 134). *U.S. v. Calley*, 46 C.M.R. 1131, 1138 (A.C.M.R. 1973). At the beginning of the *Calley* opinion, the court wrote that “all charges could have been laid as war crimes” and cited as support the Army field manual on land warfare. 46 C.M.R. at 1138, *citing* U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 507b (July 18, 1956) (C1, July 15, 1976) [hereinafter FM 27-10]. Paragraph 507b itself is devoid of reference to black letter law on this point and states: “Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.” Neither *Calley* nor the Army’s Field Manual provides any further discussion on the amenability of U.S. personnel to trial by a military tribunal other than court-martial.

¹⁸⁷ *War Crimes Act Hearings*, *supra* note 165, at 15 (statement of John J. McNeill).

¹⁸⁸ A violation of Article 109 carries a maximum punishment of five years, and the offense of extortion under Article 127 authorizes a maximum of three years of confinement. MCM, *supra* note 10, ¶¶33.e(2) and 53.e. The War Crimes Act authorizes any term of years to life imprisonment for the same conduct, if it occurs within the context of a conflict covered by the Geneva Conventions. 18 U.S.C. § 2441(a) (LEXIS through May 5, 2005).

that one could imagine[.]”¹⁸⁹ the DoD representative implied that courts-martial under the existing UCMJ articles are a sufficient measure of justice.¹⁹⁰

2. The Possible Impact of the War Crimes Act on Article 18

Although the applicability and scope of military commissions was discussed during the hearings, such comments were not made with U.S. military members in mind. At the time of the hearings, the proposed bill criminalized conduct when U.S. citizens or members of the U.S. armed forces were *victims* of war crimes. When Judge Robinson O. Everett advocated for an expansion of federal jurisdiction through the use of military commissions, he necessarily excluded U.S. service members because none of the three cases he referenced in support of the use of military commissions involved trials of U.S. military members.¹⁹¹ Furthermore, as discussed above, discipline of U.S. military members was historically imposed through trials by court-martial. From the DoD perspective, expanding the definition of a perpetrator under the War Crimes Act to specifically cover U.S. military members would not change the practice of the DoD. Technically, the new federal law would allow the U.S. military to prosecute additional crimes through the general article, but there was no need to consider using the military commission to try U.S. military members when courts-martial were deemed adequate.¹⁹²

¹⁸⁹ *War Crimes Act Hearings*, *supra* note 165, at 19 (statement of Michael J. Matheson).

¹⁹⁰ *Id.* at 14 (statement of John J. McNeill, noting that military members were court-martialed for conduct occurring in Somalia and Panama that “might have amounted to grave breaches of the Geneva Conventions”).

¹⁹¹ *Id.* at 20, 22 (testimony and statement of the Hon. Robinson O. Everett), *citing Ex parte Quirin*, 317 U.S. 1 (1942) (trial by military commission of German saboteurs arrested in the U.S.), *In re Yamashita*, 327 U.S. 1 (1946) (trial by military commission of Japanese general for war crimes), and *Madsen v. Kinsella*, 343 U.S. 341; 72 S. Ct. 699 (1952) (trial by occupation court in Germany of a American civilian for murder of her husband who was a member of the U.S. military).

¹⁹² See *War Crimes Act Hearings*, *supra* note 165, at 18 (statements of Rep. McCollum and Mr. McNeill). When Mr. McNeill suggested that the statute did not need amending beyond adding classes of persons covered by the crime, he incorporated Judge Everett’s view of the viability of the military commission in certain contexts (comments which omitted reference to the use of military commissions to try U.S. service personnel). *Id.*; see *supra* note 191 and accompanying text. Therefore, when Mr. McNeill described the extent of current

The language of the UCMJ leaves open the question whether Article 18 authorizes the trial of a U.S. military member by a military commission when 1) the offense is barred by application of the UCMJ and 2) the federal district courts have jurisdiction over the offense. The first sentence of Article 18 suggests that if a military member is on active duty status, he or she will be subject to trial by general court-martial.¹⁹³ Military practice follows this principle.¹⁹⁴ However, the second sentence of Article 18 does not expressly exclude military members from being tried under the laws of war through the use of other tribunals.

The War Crimes Act expanded U.S. federal criminal jurisdiction over law of war offenses but did not expressly broaden Title 10 military jurisdiction. Although Congress had previously created a forum (through the UCMJ) to try military members for a broad range of offenses, when it passed the War Crimes Act it declined to add war crimes to Title 10 either directly by amending the punitive articles or indirectly by expanding the jurisdiction of Article 134 to incorporate the new capital crimes available under the federal statute.¹⁹⁵ Similarly, despite the invitation to amend Articles 18 and 21,¹⁹⁶ Congress chose not to comment on the reach of military tribunals.

Allowing a military commission to try a U.S. service member for a law of war offense that is punishable by death might circumvent Congress's intent to limit the circumstances in which persons described in Article 2 (e.g., active duty military members)

UCMJ jurisdiction, he distinguished active duty members who may be tried by court-martial from others triable by military commissions: "we do have full jurisdiction over our active duty people; that is correct. We also have jurisdiction of general courts-martial under the UCMJ. And, if I understood the judge's proposal correctly, it's based on his view that there is some residual authority under the Constitution to exercise jurisdiction under the UCMJ . . . even now, without additional statutory authority." *War Crimes Act Hearings, supra*, at 18.

¹⁹³ See *supra* note 88 and accompanying text.

¹⁹⁴ See *supra* notes 71, 80-81, and 86 and accompanying text.

¹⁹⁵ Prior to the passage of the War Crimes Act, breaches of the Geneva Conventions could be prosecuted as clause 1 or 2 offenses under Article 134. For a sampling of pre-MCJ courts-martial that used the general article to prosecute law of war offenses, see *supra* notes 80-81. Still, the mere passage of the Act provided military authorities with a greater range of non-capital offenses that can be incorporated through clause 3 of Article 134.

¹⁹⁶ See *War Crimes Act Hearings, supra* note 165, at 18, 20-21, and 49.

are subject to capital punishment.¹⁹⁷ Congress prohibited the application of the death penalty to a U.S. service member except when expressly authorized by the UCMJ.¹⁹⁸ Because the restriction on capital punishment appears only in the first sentence of Article 18, does it limit the ability to impose the death penalty on a U.S. service member tried by a military commission?¹⁹⁹ In his testimony at the 1996 War Crimes Act hearings, Judge Everett implied that the bar in Article 134 to prosecuting capital offenses by courts-martial may equally apply to military commissions. Referring to the language that limits the application of Article 134 to non-capital crimes, he said, "It's a technical point, and . . . I would hope that would be dealt with somewhere along the line, because it would be unfortunate to deprive courts-martial *and military commissions* of an opportunity to try cases where they might be the only really realistic forum that could be used."²⁰⁰

The proponent in favor of using a military commission to try a U.S. service member may argue that the passage of the War Crimes Act did nothing to affect the jurisdiction to try a U.S. soldier by military commission.²⁰¹ Many crimes described in the War Crimes Act were considered violations of the law of war long before the legislation was drafted, and the legislative history does not suggest that Congress intended the War Crimes Act to fully occupy and criminalize violations of the law of armed conflict. To implement the provisions of the Geneva Conventions in a way that restricts the military from prosecuting its own members would run counter to Congress's general intent.

¹⁹⁷ See *infra* section VIII.E.

¹⁹⁸ Article 18, 10 U.S.C. § 918 (LEXIS through May 5, 2005).

¹⁹⁹ See *supra* note 92 and accompanying text.

²⁰⁰ *War Crimes Act Hearings*, *supra* note 165, at 40 (emphasis added) (testimony of Judge Everett).

²⁰¹ Judge Everett had also recommended that House Bill 2587 include the following language: "Enactment of this Law shall not repeal or diminish in any way the jurisdiction of any court-martial, military commission, or other military tribunal under Articles 18 and 21 . . . or any other Article of the Uniform Code of Military Justice, or under the law or war or the law of nations." *Id.* at 49 (letter dated June 17, 1996).

When evaluating Congress's intent toward the continuing application of military commissions, it is crucial to separate U.S. military personnel from the other classes of persons historically eligible for trial by military commission. The legislative history of the UCMJ and the War Crimes Act both suggest that, at least in the modern context, military commissions were aimed at covering classes of persons *other than* U.S. armed forces. The War Crimes Act authorizes the United States to try a military member in federal district court for his or her conduct overseas in an armed conflict. From this perspective, the traditional purpose of a military commission—to fill a jurisdictional gap or the vacuum left by non-operational courts that would otherwise have jurisdiction—would weigh against its use.

3. Importing the War Crimes Act into Article 134

In a trial by court-martial, clause 3 of Article 134 allows military authorities to import a federal statute as an offense under the UCMJ, if the crime is non-capital. However, prosecution of some War Crimes Act offenses in a trial by court-martial may be barred by the application of *U.S. v. French*.²⁰² Because the subject matter jurisdiction of the general article is limited to non-capital crimes, only those federal crimes that do not authorize the death penalty may be imported through clause 3. Under the War Crimes Act, the death of the victim causes the violation to become a capital offense. Applying the holding in *French*, conduct that causes the victim's death pushes the federal statute outside of the scope of the subject matter jurisdiction of Article 134. (Compare Figures 4 and 5). As a result, the capital offense under the War Crimes Act can neither be imported offense under clause 3 nor alleged as prejudicial to good order and discipline or service discrediting under clauses 1 and 2. The

²⁰² See *supra* section V.A.

same conduct, however, could be charged under the UCMJ as murder,²⁰³ manslaughter,²⁰⁴ or other applicable UCMJ article.

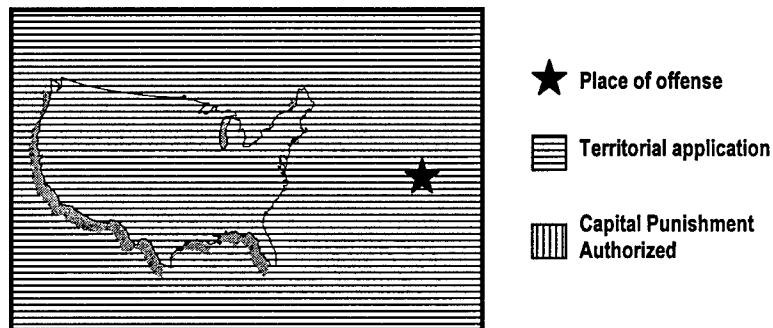


Figure 4. *Application of the War Crimes Act, Part I (without the death of the victim):* Because the War Crimes Act has worldwide territorial application (shown with horizontal lines), the first prerequisite for importation under clause 3 is met (compare with Figure 1). Capital punishment is not authorized under the War Crimes Act unless the victim dies as a result of the accused's conduct; in this situation, there is no applicable capital punishment and thus no subject matter jurisdictional bar to bringing the offense before a trial by court-martial under any clause of the general article.

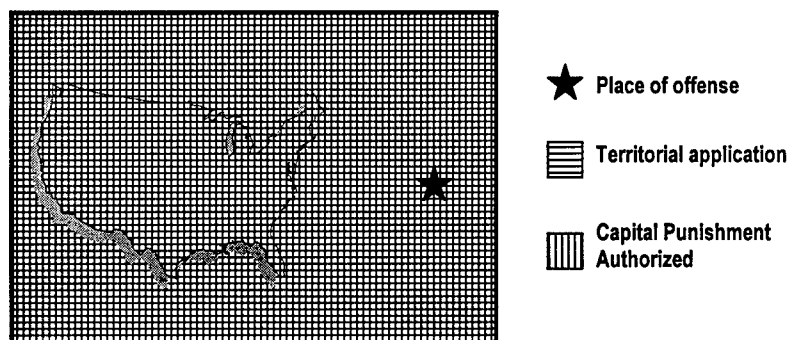


Figure 5. *Application of the War Crimes Act, Part II (when the conduct results in the victim's death):* The first prerequisite, territorial application (shown with horizontal lines), is readily met in this situation, because the federal War Crimes Act has unlimited worldwide territorial application (compare with Figure 1). Regarding the second prerequisite, capital punishment is authorized (shown with vertical lines) when the victim dies as a result of the accused's conduct. As shown in Figures 2 and 3, the intersecting lines here represent the area in which military authorities are precluded from using the UCMJ's general article to charge a federal capital offense. Wherever the War Crimes Act authorizes capital punishment for qualifying offenses, the military is precluded from trying offenses based on it. Applying the holding in *U.S. v. French*, with the general article limited to non-capital crimes, this principle precludes the importation of the War Crimes Act under clause 3 as well as the use of the Act to support clause 1 or 2 offenses when the victim of the crime has died.

Congress was aware of the obstacle posed by Article 134 for military prosecutions of capital War Crimes Act offenses. During the 1996 hearings on the War Crimes Act, Judge

²⁰³ Article 118, 10 U.S.C. § 918.

²⁰⁴ Article 119, 10 U.S.C. § 919.

Everett noted the practical problem that would exist if the death penalty were authorized under the federal criminal statute. The discussion on the death penalty prompted Judge Everett to remark: "If there is a capital offense authorized, I fear that it might have the practical effect of ousting court-martial jurisdiction that would otherwise exist, and I think that would be a very important and unfortunate byproduct."²⁰⁵

Unfortunately, Judge Everett's remarks were relegated to the periphery. The comment was not part of Judge Everett's prepared testimony,²⁰⁶ Congress did not follow up on his remarks with any questions or further discussion,²⁰⁷ and the House Report lacked any reference to this issue in its discussion about the impact of the proposed legislation and the ability to prosecute grave breaches of the Geneva Conventions.²⁰⁸ Although Judge Everett sent a follow-up letter to the subcommittee's assistant counsel shortly after the hearings concluded, he did not address this issue in any detail.²⁰⁹ The 1997 Expanded War Crimes Act did not include new hearings, and the issue of a gap in the ability to prosecute war crimes within the military justice system was never revisited.²¹⁰

The issue raised by *French* still exists. (Compare Figures 2 and 5.) The limitations of the general article will continue to partially frustrate the purpose of the War Crimes Act as long as the DoD takes the lead in prosecuting U.S. military members and bringing them to trial by courts-martial.²¹¹ Because active duty military are the primary actors in prosecuting a war, they are also potential offenders in every conflict. As we have seen from the cases arising out of the recent conflicts in Afghanistan and Iraq, many of the violations do not

²⁰⁵ *War Crimes Act Hearings*, *supra* note 165, at 40 (testimony of the Hon. Robinson O. Everett).

²⁰⁶ *See id.*, at 20-24.

²⁰⁷ *Id.* at 40-48.

²⁰⁸ H.R. REP. NO. 104-698, at 5 (1996), 1996 U.S.C.C.A.N. 2170.

²⁰⁹ *War Crimes Act Hearings*, *supra* note 165, at 49-50 (letter to George M. Fishman regarding H.R. 2587, June 17, 1996).

²¹⁰ H.R. REP. NO. 105-204, at 7 (1997).

²¹¹ *See infra* notes 232-236 and accompanying text.

involve the death of the victim.²¹² In these cases, the War Crimes Act remains available for importation through Article 134.

However, the victim's death triggers the availability of capital punishment under the statute and, in turn, also triggers Article 134's jurisdictional bar on trying capital offenses. This creates the undesirable result that the most egregious offenses cannot be tried and punished by a court-martial as war crimes. Although the existing punitive articles provide a mechanism to charge the accused with a crime in most cases, they do not necessarily allow for charging the *most appropriate* crime or expose the accused to the maximum penalty that the War Crimes Act would authorize.²¹³

B. The Anti-Torture Statute

In the wake of detainee abuse scandals emerging out of Afghanistan, Iraq, and Guantanamo Bay, the subject of torture is, regrettably, immediately linked to U.S. military activities. The UCMJ does not contain an article expressly prohibiting the "torture" of

²¹² Appendix 2 to this paper, *infra*, contains a non-exclusive list of incidents in which members of the U.S. armed forces have been suspected, accused, or convicted of offenses related to the conflicts in Afghanistan and Iraq.

²¹³ Consider the following scenario: a detainee dies as a result of rough treatment by a military member, but the circumstances do not support a charge of premeditated murder. In a federal prosecution for a War Crimes Act violation, the accused could receive the death penalty or imprisonment for any term of years, including life. 18 U.S.C. § 2441(a) (LEXIS through May 5, 2005). Under the UCMJ, potential charges include unpremeditated murder (Article 118(2) or 118(3)), manslaughter (Article 119), aggravated assault (128), or willful dereliction of duty (Article 92), but such charges may fail to reflect the gravity of the acts and the resulting death. Although the maximum confinement authorized under the UCMJ for unpremeditated murder aligns with the federal statute (life imprisonment), capital punishment is not authorized under Article 118(2) or (3). Also, compare the maximum penalty available under the War Crimes Act (life imprisonment) with the maximum confinement authorized for voluntary manslaughter (15 years), involuntary manslaughter (10 years), aggravated assault where grievous bodily harm is intentionally inflicted (5 years; if committed with a firearm, the maximum rises to 10 years), assault with means likely to cause grievous bodily harm or death (3 years; if committed with a firearm, 8 years), assault consummated by a battery (six months), or a willful dereliction of duty (six months). MCM, *supra* note 10, app. 12, at 3-4.

One group has suggested considering torture as cruelty chargeable under Article 93. Committee on International Human Rights and The Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 THE RECORD 183, 213 (2004). For a discussion questioning the appropriateness of using Article 93 to prosecute detainee maltreatment offenses, see *infra* notes 277-285 and accompanying text.

persons detained during an armed conflict.²¹⁴ However, federal law criminalizes acts or attempted acts of torture²¹⁵ that take place outside of the United States.²¹⁶

The anti-torture statute is relevant to the discussion of war crimes and how to integrate them into the military justice system. First, the War Crimes Act criminalizes grave breaches of the Geneva Conventions, and one of the grave breaches found in all four of the Geneva Conventions is torture of a person protected by the conventions.²¹⁷ Second, the anti-torture statute has an implied connection to the conduct of military operations. Although the anti-torture statute does not expressly list members of the U.S. armed forces in its definition of perpetrators (as the War Crimes Act does), acts committed by military members reasonably fall within the reach of the statute. The statute targets acts that take place outside of the United States. Because military operations involving hostilities or armed conflict occur primarily overseas and because the military necessarily has a role in capturing and

²¹⁴ Despite the lack of a specific article, military prosecutions have addressed allegations of detainee abuse. Allegations that could be charged as violations of the anti-torture statute in federal district courts have been charged in courts-martial as maltreatment of a subordinate (Article 93), various forms of assault (Article 128), indecent assault (Article 134), or derelictions of duty (Article 92). For examples of the types of offenses that may correspond to the federal crime of torture, see Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

²¹⁵ Torture is defined in 18 U.S.C. § 2340 (LEXIS through May 5, 2005):

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .

²¹⁶ 18 U.S.C. § 2340A(a) (LEXIS through May 5, 2005).

²¹⁷ Geneva Convention I, *supra* note 5, art. 50; Geneva Convention II, *supra* note 5, art. 51; Geneva Convention III, *supra* note 5, art. 130; Geneva Convention IV, *supra* note 5, art. 147.

detaining belligerents during such conflicts, the anti-torture statute could apply to the misconduct of U.S. military members during these operations.²¹⁸

1. Territorial Application of the Anti-Torture Statute

The anti-torture statute may be imported for use in military prosecutions under Article 134 in the same way as the War Crimes Act. If a federal statute has territorial application at the location where the crime occurred, and if there is no bar to subject matter jurisdiction, the UCMJ allows military authorities to prosecute the offense in a trial by court-martial. Thus, where federal civil authorities have jurisdiction over an act of torture, then the prerequisite of territorial application under clause 3 of Article 134 is satisfied.

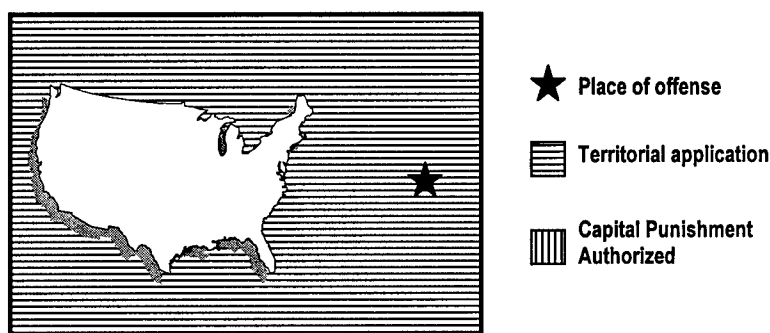


Figure 6. *Application of the Federal Anti-Torture Statute I (Territorial Jurisdiction):* The federal statute implementing the Convention Against Torture applies only outside of the United States (territorial application is shown with horizontal lines). Compare the territorial application here with Figure 1.

Currently, the anti-torture statute covers acts that occur outside of the “several States of the United States, the District of Columbia, and the commonwealths, territories, and

²¹⁸ See *supra* note 80 for a summary of courts-martial of military members for unlawful treatment of Philippine nationals and how the Army Judge Advocate General in one egregious case, *supra* note 81, denounced the use of the “water cure” to extract information as “torture” that violates the law of war. See also, e.g., Golden, *supra* note 214; Appendix 2, *infra*, entries for Sergeant (SGT) Davis, Staff Sergeant (SSG) Frederick, Private First Class (PFC) Gabbey, U.S. Marines, Navy SEALs, SGT Pittman, PFC Sting, SGT Travis, PFC Trefney, and Lieutenant Colonel (LTC) West.

There leaves little doubt that some of the severe beatings and treatment would meet the legal threshold for a war crime. For example, compare the treatment of detainees at Bagram, Afghanistan, as described by Golden, *supra*, with findings of guilt in *Prosecutor v. Mucic et al.*, Case No. IT-96-21T, Sentencing Judgement, para. 29 (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Oct. 9, 2001), for severe beatings, administering electric shocks, and creating an atmosphere of terror.

possessions of the United States.”²¹⁹ (Figure 6.) It would appear that any question of territorial application would be easily resolved. Yet, in light of the Supreme Court’s 2004

²¹⁹ 18 U.S.C. § 2340(3). Prior to October 28, 2004, the territorial application of the anti-torture statute was much more limited, and the anti-torture statute might have lacked application on, for example, a military installation in Germany, a temporary base established in Iraq, or other buildings used or leased by the United States for military operations. Subsection 3 of 18 U.S.C. sec. 2340 defined the jurisdictional scope to include “all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.” 18 U.S.C. sec. 5 refers to “all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.” Under 18 U.S.C. sec. 7 (2004), U.S. jurisdiction included:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

....

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

....

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 U.S.C. § 1101]—

(A) the *premises of United States* diplomatic, consular, *military* or other United States Government missions or entities in foreign States, *including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and*

(B) *residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.*

(Emphasis added.) Finally, 49 U.S.C. sec. 46501(2) (2004) defines the special aircraft jurisdiction of the United States to include civil and armed forces aircraft of the United States in flight regardless of location, other aircraft regardless of affiliation in flight within the United States, and other aircraft outside of the United States under certain additional conditions.

The prior definition of special jurisdiction potentially included the premises of United States military missions and buildings and land used by those missions. *Compare United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000), *cert. denied*, 534 U.S. 887 (2001) (finding that an overseas military installation and housing complex leased by the U.S. government fell within the definition of special and maritime jurisdiction), *with United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (finding no such jurisdiction), *superseded by statute as stated in In re Ski Train Fire in Kaprun, Austria*, Prod. Liab. Rep. (CCH) ¶ 16850 (S.D.N.Y. Dec. 8, 2003). Until this loophole was closed, the statute might have exempted from jurisdiction precisely those areas where the U.S. military conducted operations and where maltreatment of detainees was found to occur. *See, e.g., Golden, supra* note 214 (describing a U.S. Army investigation into severe abuse that contributed to the deaths of two detainees in Bagram, Afghanistan).

decision in *Rasul v. Bush*,²²⁰ future litigation is possible on the question of whether the U.S.-operated base at Guantanamo Bay qualifies as part of the United States under the anti-torture statute.²²¹

2. “Crimes Not Capital:” The Barrier to Importing Certain Torture Violations Under the General Article

Satisfying the prerequisite of territorial application is only half of an analysis of whether Article 134 can be used to allege a violation of U.S. federal law. As discussed above in section V, the application of the general article is limited to non-capital crimes. Judicial precedent precludes the use of a federal statute under any clause of Article 134 when the crime is a capital offense. In this way, Article 134’s limitations affect the anti-torture statute in the same way as the War Crimes Act.

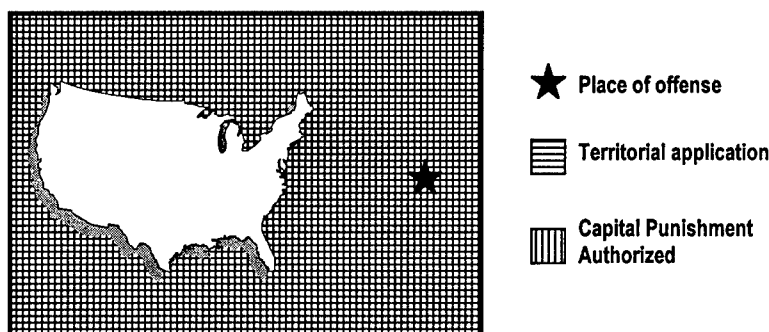


Figure 7. *Application of the Federal Anti-Torture Statute II (when capital punishment is triggered by the victim's death):* Capital punishment is authorized when the victim dies as a result of the accused's conduct. Because the Title 18 statute applies (shown with horizontal lines) where the offense occurred and because the death penalty is authorized (shown with vertical lines), the federal statute cannot be imported under clause 3, nor may a clause 1 or 2 offense either be charged as a standalone offense or used to form a lesser included offense (compare with Figure 5). However, if the same conduct occurred within the jurisdiction of the United States, where the statute lacks territorial application, the crime could be charged as a clause 1 or 2 standalone offense (compare with Figure 3).

²²⁰ 542 U.S. ___, 124 S. Ct. 2686 (2004) (holding that the writ of habeas corpus is available to detainees at the U.S. military base at Guantanamo Bay, Cuba).

²²¹ This is a potential argument for the defense in a prosecution under the anti-torture statute. If territorial application is lacking, federal prosecutors will lack jurisdiction to try the offense and military prosecutors will be barred from importing the offense into a court-martial under clause 3 of Article 134.

Similar to the punishment authorized under the War Crimes Act,²²² the anti-torture statute allows the death penalty when the victim's death results from the accused's prohibited conduct.²²³ (Compare Figures 5 and 7.) Under *United States v. French*, when the death penalty is available as a punishment for a violation of the federal criminal statute, that statute may neither be incorporated under clause 3 of Article 134 nor charged as a standalone offense under clause 1 or 2.²²⁴ When the federal crime is a capital, it falls completely outside the subject matter jurisdiction of 134 and the competence of courts-martial. Once again, under such circumstances, military authorities are required to rely on existing UCMJ articles to prosecute offenses that amount to torture.

VII. THE INADEQUACY OF STATUS QUO

A. General Considerations

A court-martial could prosecute a military member for murder of a person protected by the Geneva Conventions without mentioning the conventions or using the term "war crime." Supporters of the status quo may argue that it is not necessary to amend the UCMJ to pursue justice and prosecute offenses that take place within the context of an armed conflict. If the goal is to ensure that the fact finder is aware of the wartime context, this is already satisfied by existing rules that allow prosecutors to present evidence of the facts and circumstances of the offense during the findings phase²²⁵ and to provide evidence of aggravating factors during the sentencing phase.²²⁶

²²² 18 U.S.C. § 2441(a) (LEXIS through May 5, 2005).

²²³ 18 U.S.C. § 2340A(a). The statute authorizes imprisonment for 20 years for conspiracy to torture, attempted torture and torture not resulting in death. 18 U.S.C. § 2340A(a) and (c).

²²⁴ See *supra* section V.A.

²²⁵ See generally MCM, *supra* note 10, MIL. R. EVID. 401.

²²⁶ *Id.*, R.C.M. 1001(b)(4).

Is bringing war crimes specifically into Title 10 a distinction without a real difference? During the Vietnam conflict, 122 military members were convicted of killing noncombatants.²²⁷ Aside from courts-martial of U.S. service members that have already occurred, other countries have used the court-martial process to prosecute their soldiers for murder and abuse.²²⁸ Under this view, the UCMJ provides an adequate mechanism to hold offenders accountable for crimes committed during armed conflicts. However, the current system significantly undervalues the severity of war crimes.

Yet, maintaining the status quo under the current system creates a catch-22. The military is the body primarily responsible for day-to-day operations in armed conflict, and the Geneva Conventions were designed to regulate the conduct during armed conflicts based on evolving norms of international humanitarian law. However, a court-martial lacks jurisdiction to try *as war crimes* the most serious breaches that occur during such conflicts. Because of the prohibition on trying capital offenses under the general article, the War Crimes Act and federal anti-torture statute are shut out of military prosecutions when the victim's death results from the crime.²²⁹ Instead, commanders must rely on specific UCMJ offenses to charge the most serious crimes of the armed conflict. Thus, an unlawful killing might be charged as murder (Article 118), voluntary manslaughter (Article 119), or assault

²²⁷ Edmund Sanders, David Zucchini & Stephanie Simon, *The Conflict in Iraq: Killings Sting Proud Battalion*, L.A. TIMES, Dec. 13, 2004, at A1.

²²⁸ See, e.g., Ian Bruce, *Army May Halve Combat Tours in Move to Boost US Recruitment*, HERALD (Glasgow), Sep. 28, 2004, at 10 (describing charges of murder in a civilian court against a British soldier and charges against a Dutch marine for violating the rules of engagement and negligence resulting in the death of a civilian); *Charged with Killing Those They Were Sent to Protect*, DAILY TELEGRAPH, Feb. 4, 2005, at 30 (reporting on seven British soldiers who faced courts-martial for punching and hitting an Iraqi man with rifle butts and three British soldiers facing courts-martial for abuse of Iraqi civilians).

²²⁹ See *supra* notes Figures 5 and 7 and accompanying text.

with intent to commit murder (Article 134).²³⁰ The distinction that can be made in the federal criminal system does not exist in Title 10 prosecutions.²³¹

Unfortunately, the current system creates its own inertia to maintain the status quo. According to a Memorandum of Understanding (MOU) between the Department of Justice (DoJ) and Department of Defense, most crimes committed by persons subject to the UCMJ, i.e., military personnel, will be investigated and prosecuted by the DoD.²³² For example, the DoD is the lead agency for prosecuting crimes related to scheduled military activities, including organized maneuvers away from a military base.²³³ When the MOU was written in 1984, grave breaches of the Geneva Conventions were not yet incorporated into U.S. federal criminal law. It made sense to prosecute offenses committed by U.S. service personnel during an armed conflict through the military justice system.

The anti-torture statute and War Crimes Act altered the landscape behind the MOU when they became part of the federal criminal code. The new laws defined offenses that could either explicitly (in the case of the War Crimes Act) or implicitly (under the definitions

²³⁰ See, e.g., Brian Donnelly & Matt Spetalnick, *US Soldier Jailed One Year for Murder of Injured Iraqi*, HERALD (Glasgow), Jan. 15, 2005, at 1; Edmund Sanders, *The Conflict in Iraq: U.S. Soldier Pleads Guilty in 'Mercy' Killing of Iraqi*, L.A. TIMES, Dec. 11, 2004, at A13; Kate Zernike, *U.S. Soldier Found Guilty in Iraq Prison Abuse Case*, N.Y. TIMES, Jan. 15, 2005, at A5; *Charges Reduced in Iraq Killings: A Captain Will Stand Court-Martial on Counts of Dereliction of Duty Instead of Murder in What Was Called "A Mercy Killing."* L.A. TIMES, Dec. 8, 2004, at A3.

²³¹ For example, the federal criminal statute describes the common crime of murder or manslaughter differently from an intentional killing in violation of the Geneva Conventions. Compare the elements of 18 U.S.C. sec. 1111 (murder) and sec. 1112 (manslaughter) with the offense described in the War Crimes Act at 18 U.S.C. sec. 2441(c).

²³² U.S. DEP'T OF DEFENSE, DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES Enclosure 1 (Jan. 22, 1985), *reprinted in* MCM, *supra* note 10, app. 3. Specifically, the MOU assigns primary investigative and prosecutorial responsibility to DoD for crimes of U.S. armed forces personnel that occur 1) on military installations, *id.* at para. C.2a, or 2) away from military installations when the offenses are "normally tried by court-martial," *id.* at para. C.3a. As an exception to the general rule, the MOU requires referral to the Federal Bureau of Investigations of any cases in which military members are suspected of "significant" allegations of conflicts of interest, bribery, and frauds against the United States. *Id.* at para. C.1.

²³³ *Id.* at paras. C.2 and C.3b. However, the DoJ may assume jurisdiction with the concurrence of the Attorney General or the Criminal Division of the DoJ.

of the anti-torture statute) describe the conduct of members of the U.S. armed forces during military operations. However, Title 10 was not amended to ensure that the DoD would be able to prosecute these federal offenses to the same extent as the DoJ. Thus, the DoD became constrained in prosecuting war crimes under Title 10 in a way that the DoJ under Title 18 was not. The MOU did not change, and the presumption contained in the MOU continues to weigh in favor of allowing the DoD to prosecute common crimes under the UCMJ through the use of courts-martial.²³⁴ Regrettably, DoD policy²³⁵ and rules governing courts-martial²³⁶ have yet to acknowledge the change in the federal legal landscape that recognized the greater seriousness of war crimes and brought them into the domestic criminal framework.

B. The Impact of Double Jeopardy

Once the military prosecutes a soldier at a court-martial for murder of an Iraqi civilian, does the soldier face exposure to a U.S. federal criminal prosecution for a war crime as well? The differing elements between the federal and military criminal justice systems raise the question whether the current practice leaves the military member vulnerable for multiple U.S. prosecutions.

²³⁴ As suggested *supra* in note 233, the DoJ could assume jurisdiction over war crimes and violations of the federal statutes. This paper does not advocate the transfer of all war crimes cases to the DoJ. The military justice system remains the most appropriate primary investigative and prosecutorial agency with respect to war crimes committed by U.S. service members. Expanding the military justice system to allow courts-martial prosecutions of war crimes to the extent allowed under federal law would bring a greater overall benefit at a lower administrative cost than transferring all prosecutorial responsibilities to the DoJ.

²³⁵ See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 5.5.4 (Dec. 9, 1998) [hereinafter DOD DIR. 5100.77] (requiring service secretaries to provide for disposition of law of war violations under the UCMJ, where appropriate).

²³⁶ The discussion following Rule for Courts-Martial 307(c)(2) weighs against charging a U.S. service member with a law of war violation when a specific UCMJ offense is available: "Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war." MCM, *supra* note 10, R.C.M. 307(c)(2) (Discussion). Unfortunately, the Manual for Courts-Martial lacks explicit direction on when the practitioner may depart from "ordinary" practice and charge the violation under the laws of war instead of under the UCMJ.

The prohibition against double jeopardy applies to military courts-martial. In 1907, the Supreme Court held that a soldier who had been acquitted at a trial by court-martial could not be subject to a trial in the federal civilian court for the *same* offense.²³⁷ This holding has found its way into the Manual for Courts-Martial and court-martial practice.²³⁸ However, the double jeopardy bar does not apply when the soldier is tried by both a court-martial and federal civilian court for *different* offenses that arise out of the same conduct.²³⁹ “The double jeopardy clause is only implicated if the legislature intended that the crimes be treated as the same offense.”²⁴⁰ One court used the test promulgated under *United States v. Blockburger* to analyze the elements of each separately charged offense and determine congressional intent regarding those offenses.²⁴¹ Under this test, the double jeopardy clause may be implicated either if the analysis shows that the two offenses contain the same elements or that one is a lesser included offense of the other.²⁴²

²³⁷ *Grafton v. United States*, 206 U.S. 333 (1907). However, prosecution by a state or foreign court is not constitutionally barred. It is a matter of policy, and not the right of an accused, that a person who has been tried by a state court should not ordinarily be tried by court-martial for the same offense. See the discussion following R.C.M. 201(d) in MCM, *supra* note 10. See also *Perry v. Harper*, 307 P.2d 168 (Okla. Crim. App. 1957) (the state’s jurisdiction was not destroyed where a soldier had been arraigned in state court for a drunk driving offense and later acquitted by court-martial; comity required only that the second sovereign postpone the exercise of jurisdiction until the first sovereign has exhausted its remedy). For crimes committed overseas, treaties or Status of Forces Agreements may affect the choice of sovereign exercising jurisdiction over the offense. *Id.* See *Wilson v. Girard*, 354 U.S. 524 (1957) (holding that under an administrative agreement with Japan, the United States had waived its right to try the soldier for causing a Japanese civilian’s death through negligence).

²³⁸ Rule for Courts-Martial 907(b)(2)(C) notes that a prior court-martial or federal civilian trial for the same offense may be grounds for dismissal of a charge. The discussion following Rule for Courts-Martial 201(d) states: “Under the Constitution, a person may not be tried for the same misconduct by both a court-martial and another federal court.” See also *United States v. Smith*, 912 F.2d 322, 324 (9th Cir. 1990) (noting that the “military tribunal and the federal court represent the same sovereign”). Similarly, Article 44 of the UCMJ precludes a second court-martial for the same offense. Article 44(a), 10 U.S.C. § 844(a) (LEXIS through May 5, 2005).

²³⁹ *United States v. Ragard*, 56 M.J. 852, 855 (Army Ct. Crim. App. 2002). After a Washington D.C. police officer discovered an active duty captain engaged in oral sex with another man in a public park and in front of five onlookers, the accused was charged with indecent exposure by the civilian court and tried for sodomy by a general court-martial.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 855-56, citing *U.S. v. Blockburger*, 284 U.S. 299, 304 (1932).

²⁴² See *id.* at 856.

For example, when the federal crime of torture is imported into Title 10 prosecutions through the use of clause 3 of the general article,²⁴³ the elements of the Title 18 statute become the elements of the Article 134 offense charged in the court-martial. Because the elements are taken *directly* from federal law, the federal and military offenses are the same, and application of double jeopardy will likely preclude a federal civilian court from later trying the soldier for the Title 18 crime of torture. In contrast, when the soldier is tried for the same substantive conduct as an aggravated assault under Article 128 of the UCMJ, the elements between aggravated assault and torture may differ enough in their definitions to allow a judge to conclude that these are separate offenses. If so, then the soldier is vulnerable for trials both under military and federal law.

To use another example, if a U.S. soldier intentionally kills a person protected by one of the Geneva Conventions, the conduct falls under the prohibitions set forth by the War Crimes Act. Based on current DoD practice, the soldier would likely be tried by a court-martial for murder in violation of Article 118 of the UCMJ.²⁴⁴ However, the common crime of murder lacks the prominent element contained in the War Crimes Act: that the conduct occurs in the context of a qualifying armed conflict. If a judge determines that murder under section 918 of Title 10 (Article 118) is a lesser included offense of the Title 18 War Crimes Act violation, then the federal civilian courts might be barred from trying the soldier for the war crime. However, if the judge determines that Congress intended to define “intentional killing” under the War Crimes Act in a different manner than under Article 118, then a second trial by the federal civilian courts might be allowed. Because no U.S. military members have been tried in U.S. federal court for violations of the War Crimes Act or the

²⁴³ This assumes that the victim has not died as a result of the accused’s conduct and that there is no subject matter jurisdictional bar to trying the offense under the general article.

²⁴⁴ See *supra* notes 186-187, 190, 232, and 235-236 and accompanying text.

anti-torture statute, it is unclear whether federal courts would find Title 10 crimes to be lesser included offenses of these Title 18 crimes.

Furthermore, double jeopardy will not likely attach when a military member is tried for offenses under clauses 1 and 2 of Article 134. Although the federal statute may provide the framework for the charge, it is not necessary to reference the statute or use all of its elements to draft a standalone clause 1 or 2 offense.²⁴⁵ The heart of these offenses is the internal or external impact to the military—clause 1 and 2 offenses describe conduct that is criminal *because* of its military context. These offenses will always include a necessary element that the federal statute lacks: that the conduct is either prejudicial to military discipline or is of a nature to bring discredit to the armed forces.²⁴⁶ Because this second element is unique to the military and finds no counterpart in federal law, offenses falling under clause 1 and 2 of Article 134 may evade double jeopardy concerns altogether.

The current legal situation leaves the United States between a rock and a hard place. If the DoD attempts to maximize the use of existing federal war crimes and anti-torture legislation, double jeopardy could bar any later federal civilian trials for crimes imported into a court-martial under clause 3 of Article 134. This policy, however, still leaves unresolved the fact that the more severe war crimes, those in which a victim has died as a result of illegal conduct by the accused, are out of reach of the UCMJ *as war crimes*. In those cases, only the federal civilian courts could pursue such prosecutions. As long as the DoD remains the lead agency to prosecute U.S. armed forces,²⁴⁷ military authorities are left to resort to a codified

²⁴⁵ See *supra* section IV.B.

²⁴⁶ MCM, *supra* note 10, pt. IV, ¶60.b(2).

²⁴⁷ See *supra* notes 232-236 and accompanying text.

scheme of common crimes to prosecute the most severe acts in an armed conflict and the most serious violations of international humanitarian law.²⁴⁸

²⁴⁸ Although the United States is currently not a party to the International Criminal Court (ICC), the vulnerability of U.S. service personnel to ICC jurisdiction should not be ignored. Under Article 13(2) of the Rome Statute, the ICC could exercise jurisdiction over offenses committed on the territory of a State party or if the accused is a national of a State party. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter ICC Statute].

Although the United States has been actively pursuing bilateral agreements under Article 98(2) of the ICC Statute to reduce the possibility of ICC prosecution of U.S. military members, 1) the validity of these agreements remains untested in ICC jurisprudence and 2) these agreements may not necessarily cover every service member in every situation. It is still possible that a member of the U.S. armed forces may be accused of committing a crime in a country with which the U.S. does not have such an agreement, and the soldier could be called to appear before the ICC through the reach of non-U.S. nationality. Many members of the U.S. armed forces, particularly junior enlisted members, hold citizenship from other countries; as of July 2002, about 30,000 non-citizens served in the U.S. military. Kelly Wallace, *Bush Speeds Citizenship for Military*, CNN, July 3, 2002, at <http://archives.cnn.com/2002/US/07/03/bush.military.citizenship/index.html> (last visited Apr. 11, 2005). There are rare situations where unknown or "latent" citizenship creates unexpected obstacles for members of the U.S. armed forces. See, e.g., Kelly Jeter, *Pilot Discovers He's Not an 'American' After All*, Air Force Link, July 20, 2004 at <http://www.af.mil/news/story.asp?storyID=123008196> (last visited Apr. 11, 2005) (describing a U.S. Air Force pilot's scramble to obtain official U.S. citizenship after discovering that the citizenship paperwork filed during adoption proceedings when he was a German infant was incomplete; despite being raised as an American and more than a decade of U.S. military service, he was ultimately required to take the oath of citizenship before he was issued a U.S. passport needed for a deployment).

In the unlikely event a U.S. military member finds himself or herself under investigation by the ICC, jurisdiction over the offense might be overcome by the United States' ability and willingness to try the member in national courts, including military courts-martial. ICC Statute, art. 17(1)(a). The ICC may also lack jurisdiction under the principle of avoiding double jeopardy between national and international tribunals. ICC Statute, art. 17(1)(c) and 20(3). However, according to one scholar, the concept of international double jeopardy might not apply if there is a reluctance to try a person for international crimes, specifically when "the person was prosecuted and punished for the same fact or conduct, but the crime was characterized as an 'ordinary crime' (e.g. murder) instead of an international crime (e.g. genocide) with a view to deliberately avoiding the stigma and implications of international crimes" CASSESE, *supra* note 86, at 321. See also ICC Statute, art. 17(2) (describing factors to be used to determine the unwillingness of a state to genuinely carry out an investigation or prosecution). Unfortunately, the codification in the UCMJ has not kept pace with the trends in international criminal law or the developments in international humanitarian law during the past sixty years. The constitutive statutes of the Iraqi Special Tribunal, International Criminal Tribunal for Rwanda, and International Criminal Tribunal for the Former Yugoslavia as well as the ICC Statute all contain articles prohibiting war crimes. Statute of the Iraqi Special Tribunal, art. 13(a), *adopted by and annexed to* Coalition Provisional Authority Order No. 48, Dec. 10, 2003, at <http://www.iraqcoalition.org/regulations/> [hereinafter IST Statute]; Statute of the International Criminal Tribunal for Rwanda (as amended), art. 4, *adopted by and annexed to* S.C. Res. 955, U.N. Doc. S/RES/955 (1994), at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> [hereinafter ICTR Statute, Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), arts. 2-3, *adopted by and annexed to* S.C. Res. 827, U.N. Doc. S/RES/827 (1993), at <http://www.un.org/icty/legal/doc/index.htm> [hereinafter ICTY Statute]; ICC Statute, *supra*, art. 8(a). The integration into Title 10 of recognized international crimes need not stop at war crimes. David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 16 (2001). The Iraqi Special Tribunal, a court created by the U.S. occupation authority, also codified genocide, crimes against humanity, and other serious violations of the laws and customs of armed conflict. IST Statute, *supra*, arts. 11, 12, and 13(b)-(c). For other examples of codification of atrocity crimes, see ICTY Statute, *supra*, arts. 4 (genocide) and 5 (crimes against humanity); ICTR Statute, *supra*, arts. 2 (genocide) and 3 (crimes against humanity); and ICC

C. The Role of State Responsibility

All four of the 1949 Geneva Conventions obligated state parties to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” defined in the Conventions.²⁴⁹ In 1996, the implementation of the Geneva Conventions was a major motivation in pursuing passage of the War Crimes Act.²⁵⁰ At the time, the administration viewed the legislation as an important demonstration that the United States was fulfilling its responsibilities as a party to the Geneva Conventions by closing “unfortunate jurisdictional gaps” in domestic law.²⁵¹ “Expansion of U.S. criminal jurisdiction over war crimes will serve not only the purpose of ensuring that the United States is able to comply fully with its obligations under international law, but will also serve as a diplomatic tool in urging other countries to do the same.”²⁵²

The United States considers itself “to be among the most forceful advocates for the principle of accountability for war crimes, genocide and crimes against humanity.”²⁵³ The military pledges to hold its own personnel accountable for crimes committed during armed conflict,²⁵⁴ but the efficacy of the military justice system is only as good as the laws that

Statute, *supra*, arts. 6 (genocide), 7 (crimes against humanity), and 8(b)-(e) (other serious violations of laws of armed conflict). Strengthening Title 10 by codifying crimes already contained within Title 18, specifically crimes recognized internationally and contained the War Crimes Act and anti-torture statute, will certainly assist military prosecutors in seeking justice, and it may also provide the added benefit of protecting U.S. service members from international prosecutions.

²⁴⁹ Geneva Convention I, *supra* note 5, art. 49; Geneva Convention II, *supra* note 5, art. 50; Geneva Convention III, *supra* note 5, art. 129; Geneva Convention IV, *supra* note 5, art. 146.

²⁵⁰ See *supra* note 166 and accompanying text.

²⁵¹ *War Crimes Act Hearings*, *supra* note 165, at 20 (testimony of Judge Robinson O. Everett).

²⁵² *Id.* at 13 (testimony of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State); text accompanying note 185, *supra* (testimony of John H. McNeill, Senior Deputy General Counsel (International Affairs and Intelligence), Office of Legal Counsel, Department of Defense).

²⁵³ Press Release, U.S. Dep’t of State, U.S. and Romania Sign Article 98 Agreement, at <http://www.state.gov/r/pa/prs/ps/2002/12393.htm> (Aug. 1, 2002).

²⁵⁴ FM 27-10, *supra* note 186, at paras. 498 (“Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.”) and 511 (“The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”).

Congress provides. Unfortunately, the tension between Title 18 and Title 10 jurisdiction over war crimes leaves the full implementation of the Geneva Conventions into domestic law incomplete. It also leaves the U.S. military lacking in the full range of prosecutorial tools. Failure to provide the military justice system with the full means of prosecuting war crimes erodes the credibility of the United States as a leader in the field of international humanitarian law.

Until the UCMJ is amended to fully integrate war crimes into its criminal provisions, the status quo will continue to allow individuals to escape the stigma and full criminal liability for war crimes.²⁵⁵ Charging war crimes as common crimes under the UCMJ blurs the distinction between the two categories in a way that contradicts the trend of imposing measurable international criminal responsibility for war crimes. When this happens, war crimes *become* ordinary crimes. When this happens, the United States stumbles in fulfilling its state responsibility.

Today, America's conduct of war faces greater scrutiny—both domestically and abroad—than ever before. Congress is becoming increasingly involved in providing the courts with the tools to prosecute international crimes. Starting more than thirty years ago with the federal statute prohibiting the killing of internationally protected persons,²⁵⁶

²⁵⁵ Conviction of a common crime will often carry a lesser stigma than a war crime conviction. In a case arising out of the first Gulf War, Airman First Class Manginell was court-martialed for looting in violation of Article 103 after appropriating a camera and four watches from a warehouse he was guarding. *U.S. v. Manginell*, 32 M.J. 891 (A.F.C.M.R. 1991). Although his guilty plea was affirmed, one concurring judge was uneasy about the ultimate fairness of the result when at least three other appellate cases involved similar conduct that was charged as simple larcenies. *Id.* at 894.

I see nothing to distinguish today's case as factually more serious. What logical reason is there to treat similar accused in a dissimilar fashion? . . . At the end of the day, a court-martial order should reflect precisely what an accused did, not distort the record. Here others involved . . . will receive a court-martial order showing they were thieves. Manginell will have an order to inform potential employers that he was guilty of something akin to a war crime. His conduct differs little but his record now is facially far more reprehensible.

Id.
²⁵⁶ 18 U.S.C. § 1116 (LEXIS through May 5, 2005).

Congress began to add international crimes to the federal criminal code.²⁵⁷ These crimes, by their nature, often overlapped with conduct described as grave breaches of the Geneva Conventions, allowing for federal prosecutions in some situations.²⁵⁸ Yet, this overlap was coincidental,²⁵⁹ and the incorporation of international crimes, including war crimes, into the domestic framework was clumsy.²⁶⁰

The tide turned with the passage of the War Crimes Act. The Act specifically sought to implement the provisions of the Geneva Convention and directly focused on the conduct of U.S. military members *in their assigned role as a fighting force*. This statute differs from other U.S. laws criminalizing conduct that has a general nexus to armed conflict. Not only did Congress authorize federal civilian jurisdiction over law of war offenses, it expressly included the wartime conduct United States military members within its reach.²⁶¹

Recently Congress again addressed the military's conduct in war when it formally condemned the abuse of detainees at Abu Ghraib prison. In a note added in October 2004 to Article 1 of the UCMJ, Congress directed military authorities to address systemic deficiencies²⁶² arising out of the abuse scandals and established a policy to investigate and

²⁵⁷ See, e.g., 18 U.S.C. § 1091 (LEXIS through May 5, 2005) (genocide); 18 U.S.C. § 1203 (hostage taking); 18 U.S.C. § 2332 (terrorism); 18 U.S.C. § 2332a (use of weapons of mass destruction); 18 U.S.C. § 2340A (torture).

²⁵⁸ H.R. REP. NO. 104-698, at 4 (1996), 1996 U.S.C.C.A.N. 2169.

²⁵⁹ *Id.*

²⁶⁰ G.I.A.D. Draper, *The Modern Pattern of War Criminality*, in WAR CRIMES IN INTERNATIONAL LAW 141, 147 (Yoram Dinstein & Mala Tabory eds., 1996).

²⁶¹ 18 U.S.C. § 2441(b) (LEXIS through May 5, 2005).

²⁶² Congress was fairly detailed in outlining its expectations:

(a) Sense of Congress. It is the sense of Congress that—

(1) the abuses inflicted upon detainees at the Abu Ghraib prison in Baghdad, Iraq, are inconsistent with the professionalism, dedication, standards, and training required of individuals who serve in the United States Armed Forces;

....

(3) the abuse of persons in United States custody in Iraq is appropriately condemned and deplored by the American people;

....

prosecute “all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States.”²⁶³ Unfortunately, this “sense of Congress” and the desire to fully implement the Geneva Conventions are aspirational goals because Congress has failed to give the DoD—the primary prosecutorial agency—the appropriate tools within Title 10 to directly prosecute grave breaches of the laws of war.

If Congress wants to address deficiencies at a systemic level, then it needs evaluate the limitations of the military justice system. Every prohibition of the War Crimes Act describes necessarily conduct that typically occurs during an armed conflict.²⁶⁴ Such conduct is no less criminal because it occurs in a military context, yet there are situations where the UCMJ lacks sanctions on par with the federal law and the ability to garner a *war crime* conviction at a court-martial. This is why the failure to acknowledge and fix the disconnect

(5) the Department of Defense and appropriate military authorities must continue to undertake corrective action, as appropriate, to address chain-of-command deficiencies and the systemic deficiencies identified in the incidents in question;

(6) the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody by the United States;

....

(8) no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of United States.

Act of Oct. 28, 2004, Pub. Law. No. 108-375, § 1091, 118 Stat. 2068 (2004).

²⁶³ *Id.* at § 1091, sec. b(2). Congress’s policy focused on more than international obligations:

(b) Policy. It is the policy of the United States to--

(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States;

(2) investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States;

(3) ensure that all personnel of the United States Government understand their obligations in both wartime and peacetime to comply with the legal prohibitions against torture, cruel, inhuman, or degrading treatment of detainees in the custody of the United States;

(4) ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee’s status is determined by a competent tribunal .

...

Id. at § 1091(b).

²⁶⁴ See, e.g., *supra* notes 80-81, Golden, *supra* note 214, and Appendix 2 *infra*.

within Title 10 is puzzling. Now that violations of the Geneva Convention are part of the U.S. domestic criminal law, and now that U.S. domestic law specifically regulates the conduct of military members during armed conflict, there is absolutely no reason *not* to integrate war crimes offenses as a codified part of the UCMJ. Failure to close this jurisdictional gap sends the message to the international community that United States is either apathetic toward its state responsibility or is unwilling to meaningfully fulfill its obligations under the Geneva Conventions.

D. Analysis of Common Charges Stemming from Current Conflicts: Comparing the War Crimes Act to Common Crimes under the UCMJ

When the Articles of War were adopted by a very young United States, the hastily implemented system was founded on the exercise of military command as a means of maintaining discipline and efficiency of the fighting force.²⁶⁵ This “soldier’s code” as tool of military discipline and efficiency²⁶⁶ has largely survived. This focus on maintaining internal discipline and the effectiveness of the fighting force makes the UCMJ, without further amendment, ill-suited to absorb the substantive violations of international laws of armed conflict that have now become part of federal law. Congress brought grave breaches of the Geneva Conventions into U.S. federal law by using the reference to the conventions themselves. In contrast Title 10 continues to rely on definitions of its common crimes to prosecute “what might amount to”²⁶⁷ grave breaches of the Geneva Conventions. Consequently, military prosecutors must attempt to stretch the existing UCMJ articles to accommodate the criminal liability that attaches to these international offenses.

²⁶⁵ *Establishment of Military Justice Hearings*, *supra* note 12, at 25 (testimony of Maj. (Ret.) Runcie).

²⁶⁶ *See supra* note 33 and notes 31 and 44 and accompanying text.

²⁶⁷ *War Crimes Act Hearings*, *supra* note 165, at 14 (testimony of John H. McNeill, describing where accused members of the U.S. military were prosecuted for “what might have amounted to grave breaches of the Geneva Conventions”).

The result is awkward. Article 92, which criminalizes failures to obey orders and regulations²⁶⁸ as well as derelictions of duty,²⁶⁹ has been used in many cases arising out of Iraq and Afghanistan to describe failures to prevent detainee abuse or properly supervise the treatment of detainees.²⁷⁰ But the breadth of Article 92 is problematic because it fails to make a distinction between low-level disorders and the much more serious grave breaches of the Geneva Conventions. Instead of directly confronting the serious conduct of what the accused actually did, dereliction of duty allegations generally focus the failures or omissions that led to the violations of international obligations. Article 92 certainly has a continuing place in prosecutions of offenses that occur during armed conflict as an ancillary charge, but it should not be mainstay or central charge that it has evolved into.²⁷¹

The primary failing of Article 92 is that, when used to allege serious violations of the laws of armed conflict, its breadth tends to dilute the severity of underlying conduct. An article that is routinely used to prosecute abuse of the government travel card²⁷² hardly contains the inherent stigma deserving of a war crime. The maximum punishment allowed underscores this point. The penalty for willful dereliction of duty in violation of Article 92 is

²⁶⁸ To qualify as a general regulation, the order or regulation must be published by the President, Secretary of Defense, service secretary, an officer having general court-martial jurisdiction, a general or flag officer, or any officer superior to any persons in these categories. MCM, *supra* note 10, pt. IV, ¶16.c(1)(a). Regulations that provide general guidance or advice for conducting military functions may not necessarily be enforceable under this provision. MCM, *supra* note 10, pt. IV, ¶16.c(1)(e).

²⁶⁹ A dereliction of duty can be willful, negligent, or as a result of culpable inefficiency. MCM, *supra* note 10, pt. IV, ¶16.c(3)(c). A person is not derelict if his or her attempts to perform are earnest but the failure is a result of ineptitude. *Id.*, ¶16.c(3)(d).

²⁷⁰ For a sample of cases in which dereliction of duty has been alleged, see the entries in Appendix 2, *infra*, on Specialist (SPC) Ambuhl, SGT Boland, SPC Canjar, SGT Davis, PFC England, SSG Frederick, Major (MAJ) Froeder, PFC Gabbey, Master Sergeant Girman, SPC Graner, SPC Harman, SPC Loper, Captain (CPT) Maynulet, SSG McKenzie, Colonel Pappas, MAJ Paulus, SGT Pittman, Sergeant First Class (SFC) Sommer, PFC Sting, SGT Travis, PFC Trefney, MAJ Vickers, and Chief Warrant Officers Welshofer and Williams.

²⁷¹ For one example of how a soldier avoided charges of maltreatment of detainees in exchange for a guilty plea on the dereliction of duty charge, see Douglas Jehl, *G.I. in Abu Ghraib Abuse Is Spared Time in Jail*, N.Y. TIMES, Nov. 3, 2004, at A4, and Josh White, *Abu Ghraib Prison MP Pleads Guilty to Reduced Charge*, WASH. POST, Nov. 3, 2004, at A12.

²⁷² See, e.g., *United States v. Mayton*, ACM S29743, 2001 CCA LEXIS 98 (A.F. Ct. Crim. App. Mar. 30, 2001).

six months of confinement per offense.²⁷³ By comparison, torture and war crimes carry twenty- and thirty-year maximum sentences under federal law.²⁷⁴

Article 93 does not fare much better.²⁷⁵ Since news broke about how U.S. military personnel handled detainees at Abu Ghraib in Iraq and Bagram, Afghanistan, the offense of maltreatment has become a buzzword in prosecutions.²⁷⁶ In the recent conflicts, the UCMJ offense of maltreatment of *subordinates* has been expanded to accommodate a new class of victims: detainees of the belligerent power or enemy.

Under the UCMJ, Article 93 violations have two elements. First, the victim must be subject to the orders of the accused and, second, it must be proved that the accused was cruel toward, abused, or maltreated the victim.²⁷⁷ The explanation of the “nature of the victim” in the Manual for Courts-Martial most appropriately describes a military member who is under

²⁷³ The lesser form of dereliction of duty through neglect carries half that amount. MCM, *supra* note 10, pt. IV, ¶16.e(3)(A)-(B).

²⁷⁴ The crime of torture is punishable by twenty years. 18 U.S.C. § 2340A(a) (LEXIS through May 5, 2005). If torture occurs during armed conflict in violation of the Geneva Conventions, the penalty rises to any term of years. *See* 18 U.S.C. § 2441(a) and (c)(1).

²⁷⁵ This offense was written into the UCMJ based on a Navy disciplinary article that prohibited the maltreatment of crews. Prior to the enactment of the UCMJ, the Army relied on the general article to prosecute this offense. 1949 House Hearings, *supra* note 23, at 1227.

²⁷⁶ News reports are unclear whether the word “maltreatment” is used a generic description of the conduct or a term of art to describe a violation of Article 93. However, the charge sheets from the courts-martial of some of the soldiers involved in the Abu Ghraib scandal contain allegations of violations of Article 93. U.S. Dep’t of Defense, DD Form 458, Charge Sheet, Mar. 20, 2004, for SGT Javal Davis, *available at* <http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html> (last visited May 14, 2005) (listing one specification of an Article 93 violation); SSG Ivan “Chip” Frederick, Jr., *available at* <http://news.findlaw.com/hdocs/docs/iraq/ifred32004chrg.html> (last visited May 14, 2005) (five specifications); SPC Charles Graner, *available at* <http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html> (last visited May 14, 2005) (four specifications); and SPC Jeremy Sivitz, *available at* <http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html> (last visited May 19, 2005) (two specifications); Golden, *supra* note 214.

²⁷⁷ MCM, *supra* note 10, pt. IV, ¶17.b. Examples of maltreatment include assault, sexual harassment, or improper punishment. *Id.*, ¶17.c(2). *See, e.g., Army E-7 Demoted for Maltreatment of Soldier, Lying to Investigators*, STARS & STRIPES, Oct. 29, 2004, *available at* <http://www.estripes.com> (last visited Feb. 11, 2005) (describing the special court-martial of Sergeant First Class Wallace Boone, who was convicted of maltreating a subordinate after he directed a soldier to write a letter to the soldier’s father listing the soldier’s deficiencies and saying that he had died because he was not focused on the mission; the soldier was required to carry the letter at all times).

the accused's direct or immediate control.²⁷⁸ However, the victim is not required to be in the same chain of command as the accused or even a member of the United States military.²⁷⁹ Persons who are not under the formal supervision or in the direct chain of command of the accused are subject to the accused's orders under Article 93 if they "by reason of some duty are required to obey the lawful orders of the accused. . . ."²⁸⁰

It is unclear whether a detainee of a non-friendly power is legally obligated to follow the orders of a U.S. military member. Neither the appellate courts nor the legislative history behind Article 93 indicate that the class of victims was intended to include POWs or detainees of an opposing force or entity.²⁸¹ Detainees and POWs are not required to take an oath promising to obey the lawful orders of the belligerent forces assigned to guard them.²⁸²

²⁷⁸ MCM, *supra* note 10, pt. IV, ¶17.c(1).

²⁷⁹ In 1956, the U.S. Army Board of Review found that Article 93 covered the maltreatment of a civilian who was working under the supervision of the U.S. Army. *United States v. Dickey*, 20 C.M.R. 486 (A.B.R. 1956). The accused, a first lieutenant, was the commanding officer of one of three U.S. Army units at a compound in Korea. The victim was a Korean national with the Korean Service Corps, and in that capacity he performed manual labor for the U.S. Army on that compound. The Board noted that prior to the incident in which the lieutenant ordered enlisted men under his command to have their military working dogs attack the victim, the accused had exercised some administrative supervision. *Id.* at 487. Because of the nature of the employment and general service relationship between the accused and victim, the court found that the accused had "sufficient authority and jurisdiction" to place conditions on the accused's activities and that the victim had a duty to obey the orders of the lieutenant. 20 C.M.R. at 489. With the victim falling under the class of persons subject to the orders of the accused, the court explained that because Congress did not limit the coverage of Article 93 only to military members, it was immaterial whether the a maltreated person be subject to the UCMJ. *Id.* The primary concern of the court was the nature of the relationship between the accused and victim. If a *de facto* superior-subordinate relationship exists built and includes the legal obligation of the subordinate to follow orders of the superior, the relationship becomes—for purposes of Article 93—the equivalent of a *de jure* superior-subordinate relationship that is inherent in a command structure and among persons subject to the UCMJ. The reports on detainee abuse, however, appear to have glossed over this analysis.

The words "subject to the Code or not" were added to the explanation after the UCMJ was initially enacted. MCM, *supra* note 10, app. 23, at 6.

²⁸⁰ MCM, *supra* note 10, pt. IV, ¶17.c(1).

²⁸¹ Compare the status of the victims from Abu Ghraib with the decision in *U.S. v. Dickey*, 20 C.M.R. 486. First, the foreign national victim in *Dickey* was a member of an entity providing services to the U.S. military, not a detained member of a belligerent nation. Second, as the Board in *Dickey* noted, the Articles of War did not contain a provision corresponding to the modern UCMJ's Article 93, and offenses of maltreating subordinates were usually charged under the general article, the 96th Article of War. 20 C.M.R. at 488. Then again, abuse of POWs and detainees was also tried under the general article. *See supra* note 80 (describing pre-UCMJ courts-martial under the general article involving abuse of detained persons). When Congress created the UCMJ, it took the offense of maltreatment of subordinates out of the scope of the general article and created a separate offense. Because there was virtually no debate surrounding Article 93, the question remains whether Congress intended to include abuse of enemy detainees in the new article or continue with the practice of using

Use of Article 93 appears to be a novel approach for criminalizing conduct toward detainees or prisoners of a *belligerent* state or entity.²⁸³ Trial judges have accepted guilty pleas²⁸⁴ and, in at least two litigated cases, the jury convicted the soldier after receiving instructions on the elements of the offense from the military judge.²⁸⁵ As these cases make their way through the appeals process, appellate courts may add to the discussion about the scope of Article 93. Ultimately, the convictions based on Article 93 will either be set aside based on the current reach of the article or, as convictions are upheld, the appellate courts may also uphold the expansion of the class of victims to include belligerent detainees.

However, Article 93 was not designed to punish war crimes. The maximum amount of confinement available for a conviction for maltreatment of subordinates under Article 93

the general article. See 1949 House Hearings, *supra* note 23, at 1227. Third, the UCMJ was being drafted contemporaneously with the negotiations of the Geneva Conventions of 1949. Following on the heels of World War II, the treatment of POWs was certainly fresh in the minds of the legislators. If the drafters had intended to extend the protections of Article 93 to POWs, regardless of whether such protections were explicitly tied to the Geneva Conventions, they would have likely been more explicit either on the face of the statute or in the legislative history. Fourth, the *Dickey* Board opined that Article 93 was adopted at the suggestion from the Navy, which had an analogous provision in its pre-UCMJ governing code and which had handled cases of officers maltreating enlisted men aboard ship. 20 C.M.R. at 488. Taking all of these factors together, the motivation behind Article 93 was to protect members of the friendly forces from maltreatment from within their own ranks.

²⁸² Under international treaty obligations, civilian detainees and POWs may not be forced to work for the war effort of a detaining power. Geneva Convention III, *supra* note 5, art 130; Geneva Convention IV, *supra* note 5, at art 147. Furthermore, the United States' Code of Conduct requires its members who are captured to "continue to resist by all means available." The Code of Conduct, Article III, *reprinted in* AIR FORCE MANUAL 10-100, AIRMAN'S MANUAL 193 (June 1, 2004). Taken together, this suggests that the status of POW or detainee and his relationship toward a captor materially differs from the status of a *de jure* "subordinate" as envisioned by Article 93.

²⁸³ In an early case under the UCMJ the Navy Board of Review found that a U.S. service member confined following a court-martial conviction is entitled to certain rights and treatment and is not to be subject to acts of cruelty, oppression or maltreatment. *United States v. Finch*, 22 C.M.R. 698 (N.B.R. 1956). Only with the recent allegations coming out of Iraq has this premise apparently been expanded to cover detainees of the belligerent nation.

²⁸⁴ See, e.g., *infra* Appendix 2, specifically, the entries for SPC Cruz, SSG Frederick, PFC Sting, SGT Travis, and PFC Trefney.

²⁸⁵ See John W. Gonzalez, *Reservist Receives 129-Day Sentence in Iraq Abuse Case: She Also Gets a Bad-Conduct Discharge and Has Her Rank Reduced*, HOUSTON CHRON., Mar. 18, 2005, at A11 (reporting on the conviction and sentencing of Specialist Sabrina Harman for cruelty and maltreatment toward detainees, among other charges); Gretel C. Kovach, *Reservist's Sentence: 10 Years*, DALLAS MORNING NEWS, Jan. 16, 2005, at 1A (reporting on the sentence of Specialist Charles Graner); *Camp Pendleton: Major Convicted in Iraqi Prison Abuse*, L.A. TIMES, Nov. 11, 2004, at B10 (reporting on the conviction of Major Clarke Paulus).

is one year.²⁸⁶ Treating the belligerent detainee in the same way as a U.S. subordinate-victim fails to take into account the unique and vulnerable status of a detainee or POW. Where the U.S. military subordinate/victim has avenues of redress,²⁸⁷ the detainee does not. Using Article 93 to charge armed-conflict-connected detainee abuse tends to devalue the nature of the crime.

Much like Article 93, the crime of assault under Article 128 was not designed with offenses against POWs and detainees in mind. Article 128 describes and defines a variety of criminal assaults, but using this article to charge crimes of abuse occurring in the context of an armed conflict is also awkward. The midnight punch to the gut outside of a downtown bar carries the same maximum punishment as punching a detainee in the custody of U.S. armed forces, but the difference is that the latter victim likely had no choice to be where he was that night. Crimes of assaulting detainees charged under Article 128 simply fail to account for the victim's status of being held in the custody of the accused.²⁸⁸ Because of this, Article 128 cannot offer an adequate distinction between the common crime of assault and the war crime of cruel or degrading treatment of persons place *hors de combat* by detention.²⁸⁹

Relying on Article 128 to charge crimes of physical abuse of detainees conveys the unfortunate message that these violations of international obligations are no more serious

²⁸⁶ MCM, *supra* note 10, pt. IV, ¶17.e.

²⁸⁷ For example, the subordinate may file a complaint of wrong against the commander under Article 138, use his or her chain of command to include the first sergeant or persons above the abuser, write to his or her elected officials, or file a complaint with the Inspector General.

²⁸⁸ Another concern about charging allegations of detainee abuse is the potential overlap of Article 93 and Article 128. Because Article 93 includes assault as one example of prohibited maltreatment, a factually similar specification also charged under Article 128 might be viewed as multiplicitious. Still, the courts are clear that not all maltreatment involving an assault will be found to be multiplicitious. For example, where a soldier directs POW Group A to assault POW Group B, Group B would be considered victims under Article 128. *United States v. Lee*, 25 M.J. 703, 705 (A.C.M.R. 1987). Group A would be considered victims under Article 93 because the accused's actions of directing the assault puts the members of Group A at risk of physical or other harm, which is viewed as a form of cruelty. *Id.* Because the harm from the assault of Group B is distinct from the harm resulting from the cruelty toward Group A, separate factual findings of criminality are permitted. *Id.*

²⁸⁹ See Geneva Conventions I, II, III, and IV, *supra* note 5, art. 3.

than brawls between military members. Certain assault offenses carry greater punishments depending on the status of the victim,²⁹⁰ but assaulting a detainee or POW is not one of them. To be sure, there is a disconnect within the domestic military code when the wartime assault of one's own superior commissioned officer can potentially carry life imprisonment, yet the same physical assault on a detained person may authorize only six months of confinement.²⁹¹ Only the latter might be a war crime,²⁹² but the penal sanction is much less severe.

Ironically, the conduct described above can properly come before a court-martial by reaching through clause 3 of Article 134 to charge violations of the War Crimes Act. So why is this not happening? Prosecutors may not wish to risk a ruling that the existing articles preempt the imported offenses charged under the general article.²⁹³ The more likely answer

²⁹⁰ For each specification of an assault consummated by a battery, an accused may receive six months of confinement. MCM, *supra* note 10, pt. IV, ¶54.e(2). Compare this the maximum penalty for the basic assault consummated by a battery with the penalties when the victim within certain categories:

1. U.S. or friendly foreign power commissioned officer: three years if the officer is *not* in the execution of his office, *id.*, ¶54.e(3); ten years per specification if the officer *is* in the execution of his office, *id.*, ¶14.e(1); life imprisonment or death if the offense occurs against an officer in the execution of his office in time of war, *id.*, ¶14.e(3).

2. A sentinel or security/military/civilian law enforcement personnel: three years, *id.*, ¶54.e(6);

3. A child under the age of 16: two years, *id.*, ¶54.e(7);

4. Warrant officer: one year and six months if the warrant officer is *not* in the execution of his office, *id.*, ¶54.e(4); five years if the warrant officer *is* in the execution of his office, *id.*, ¶15.e(1);

5. Noncommissioned officer: six months if the noncommissioned officer is *not* in the execution of his office, *id.*, ¶54.e(5); when in the execution of his office, the maximum confinement rises to three years for assaults against a superior noncommissioned officer, *id.*, ¶15.e(2), and one year for other noncommissioned and petty officers, *id.*, ¶15.e(3).

²⁹¹ Serious assaults authorize greater maximum punishments, without general regard to the status of the victim. If the assault is with a means likely to produce grievous bodily harm, the maximum punishment increases to three years (eight years, if a loaded firearm is used), MCM, *supra* note 10, pt. IV, ¶54.e(8), and if grievous bodily harm is intentionally inflicted, the maximum amount of confinement rises to five years (ten years for offenses involving a loaded firearm), *id.*, ¶54.e(9). Despite the greater military punishments for aggravated assaults, the disparity between common crimes charged under the UCMJ and war crimes as defined by federal law still exists. See *supra* note 274 and accompanying text.

²⁹² 18 U.S.C. § 2441(c)(3) (LEXIS through May 5, 2005) (criminalizing violations of common Article 3 of the Geneva Conventions, which prohibits torture or cruel treatment of persons taken out of combat through sickness, injury, detention, or other reasons).

²⁹³ The doctrine of preemption prohibits the use of the general article to charge criminal conduct already covered by Articles 80 through 132. MCM, *supra* note 10, pt. IV, ¶60.c(5)(a). Where Congress has already defined elements of an offense, the military does not have the authority to eliminate an element and create a new offense under Article 134. *United States v. Norris*, 8 C.M.R. 236, 239 (C.M.A. 1953); see, e.g., *United States v. Manos*, 25 C.M.R. 238 (C.M.A. 1958) (finding that a conviction under Article 134 of negligent exposure of the accused's naked body was preempted by the Article 134 indecent exposure offense; simple

is that the DoD policy to try U.S. military members under the UCMJ reflects a policy and preference to use UCMJ statutory provisions whenever possible and there is little motivation to change the status quo.

Military prosecutors have less choice under the UCMJ when charging crimes that cause the death of the victim. For the few soldiers who have been accused of murder of Iraqi civilians,²⁹⁴ military authorities had to rely on the common crimes listed in the Manual for Courts-Martial to draft the court-martial charges. The War Crimes Act and anti-torture statute remain out of reach in these cases.²⁹⁵ When the victim died as a result of the offense, it triggered both the possibility of capital punishment under the federal law and the bar to subject matter jurisdiction as a capital offense under Article 134. Thus, the crimes that constitute the gravest breaches of the Geneva Conventions remain free of the label of “war crimes” as long as the military members are tried by courts-martial.

The cases arising out of the current conflicts in Iraq and Afghanistan reveal the shortcomings of the status quo. The DoD remains the primary agency responsible for prosecuting these wartime offenses, despite the existence of a federal law defining war

negligence in the absence of a statute or “ancient usage” does not give rise to criminal liability). However, the preemption doctrine is not triggered simply because the offense charged under the general article contains all but one element of an offense under one of the punitive article. *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979). In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. *Id.*; see, e.g., *United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989) (declining to find that Article 112a [drug use] preempted an Article 134 offense involving MDMA or “ecstasy” before it was listed as a controlled substance.).

Using the War Crimes Act as an example, it is not likely that clause 3 offense based on the federal statute would be preempted. The Act can be seen either as creating a distinct set of crimes or as *adding* an element to some existing UCMJ provisions, i.e., that the conduct must occur in the context of an armed conflict covered by one of the Geneva Conventions.

²⁹⁴ See *infra* Appendix 2, specifically, the entries on SSG Alban-Cardenas, Second Lieutenant (2LT) Anderson, Corporal (CPL) Berg, SFC Diaz, SSG Horne, SPC Loper, SPC May, CPT Maynulet, 2LT Pantano, SFC Sommer, SSG Werst, SSG Williams, and Chief Warrant Officers Welshofer and Williams.

²⁹⁵ See *supra*, section 0. It appears that allegations falling short of murder but involving the death of the victim are similarly barred by Article 134’s subject matter jurisdiction. See Appendix 2, *infra*, entries on PFC Brand (charged with involuntary manslaughter), Lance Corporal Hernandez (initially charged with negligent homicide), SFC Perkins (involuntary manslaughter), PFC Richmond (voluntary manslaughter), and 1LT Saville (involuntary manslaughter).

crimes. The UCMJ is the DoD's primary tool, yet Title 18 war crimes have never been fully integrated into Title 10. This makes the UCMJ incomplete and ill-suited to address war crimes. To be sure, offenders end up with criminal records and go to jail, but they avoid the stigma of being labeled a war criminal. Without further changes, the UCMJ will continue to be stretched to accommodate the demand to account for crimes that occur during overseas military operations, but the result will continue to have a strained, uneasy feel.

VIII. FIVE VIEWS ON ADDRESSING WAR CRIMES COMMITTED BY U.S. MILITARY MEMBERS

We are certainly interested in bringing to justice those who commit war crimes against our nationals and our armed forces personnel, but we also have an interest in having the authority, if necessary, to prosecute any U.S. national or armed forces member who commits such acts.²⁹⁶

The status quo needs a change. The question is how to best provide the U.S. military with the ability to prosecute its own members for war crimes. This section considers and analyzes five possibilities for closing the gap between the federal and military criminal justice systems.

A. Codify the War Crimes Act as an Enumerated Article of the UCMJ

Adding a new article²⁹⁷ is the best option to align the provisions of Title 10 directly with the relevant provisions of Title 18. Appendix 1 provides a draft of a new article that

²⁹⁶ *War Crimes Act Hearings*, *supra* note 165, at 10 (statement of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State).

²⁹⁷ In the alternative, Congress can amend existing UCMJ articles to correspond with specific provisions of the War Crimes Act. For example, Congress could amend Article 118 to provide an additional category of murder of a protected person under the UCMJ. It is this author's opinion that war crimes should receive prominent placement within or near the articles that directly address the conduct of military members during war. *See supra* note 11.

proposes to integrate the War Crimes Act into the UCMJ.²⁹⁸ This approach has several advantages.

First, adding a new article will align the Title 10 with Title 18 by creating and maintaining a distinction between war crimes and common crimes within the UCMJ. The federal criminal code lists separate offenses for murder and, through the War Crimes Act, intentional killing of a protected person under the Geneva Conventions. Making this same distinction within Title 10 prosecutions is important in promoting uniformity within our domestic system of criminal laws. Why should civilians be subject to greater punishment than military members for the same conduct, especially when the underlying conventions that the Title 18 implemented primarily address the conduct of the armed forces?

Second, adding a war crimes article to the UCMJ will encourage greater uniformity in prosecuting war crimes within the military justice system.²⁹⁹ Once statutory provisions define war crimes within Title 10, military authorities may be more likely to charge serious battlefield misconduct as what it is: a war crime.

Third, such an amendment could yield greater uniformity in the range of available maximum punishments. Although the convening authority has the discretion to decide which charges are referred to trial, adding a new article aimed at war crimes can encourage the development of the practice of distinguishing between war crimes and common crimes in

²⁹⁸ The proposed article is a starting point to re-examine the UCMJ and how it prosecutes war crimes and atrocity crimes within the military justice system. The War Crimes Act provides the most obvious framework for an amendment because, as discussed throughout this paper, this Act was aimed directly at the military by the law's reference to 1) the conduct of wars and armed conflict and 2) the personnel who participate in it. The anti-torture statute can be integrated into the UCMJ through the implementation of the War Crimes Act because the Geneva Conventions referenced in section 2441(a), (c)(1), and (c)(3) of Title 18 cite torture as a grave breach. *See supra* note 217 and accompanying text.

²⁹⁹ For one court's commentary on the disparity of the conviction of the war crime of looting versus the common crime of larceny, see *supra* note 255.

courts-martial. As cases arising out of the Abu Ghraib scandal show,³⁰⁰ the maximum punishment will vary greatly depending on the offenses charged.³⁰¹ Charging crimes under a new UCMJ war crimes article will have the added effect of providing a more consistent range of punishments when the cases are presented to the military judge or court-martial panel for sentencing.

Finally, adding the substance of the war crimes act is the only proposal that coherently balances statutory military law and the use military commissions in a manner consistent with military custom and the intent of the UCMJ drafters. Traditionally, military commissions were used for U.S. service members only for offenses, with the exception of spying and aiding the enemy, that were not covered by the soldier's code.³⁰² Although military commissions have not been used to try American forces since the UCMJ was enacted, this option remains available. Adding a new war crimes UCMJ article would thus weigh against trying the U.S. service member by a military commission for violations of the Geneva Conventions.

1. Congressional Practice of Adding New UCMJ Articles as Needed

When the UCMJ was enacted, Congress saw the need for some administrative housekeeping. Proposed House Bill 2498 consolidated some offenses, deleted obsolete articles, and created new ones.³⁰³ For example, the offenses of missing a movement and

³⁰⁰ See, e.g., Monte Morin, *The World: G.I. Gets Eight-Year Sentence After Guilty Plea in Abuse Scandal*, L.A. TIMES, Oct. 22, 2004, at A4 (describing charges against Staff Sergeant Ivan "Chip" Frederick); the charge sheet for Specialist Charles Graner available at <http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html> (last visited Feb. 19, 2005) (showing a charge of violating Article 93); *Status of the Charges*, PITT. POST-GAZETTE, Dec. 21, 2004, at A8 (outlining charges against Specialist Sabrina Harman and the initial charges against Private First Class Lynndie England).

³⁰¹ See *supra* note 213 (describing the generally lower maximum punishments for enumerated UCMJ offenses compared to the maximum punishment authorized under the War Crimes Act).

³⁰² See *supra* notes 62-63 and 71 and accompanying text.

³⁰³ Article 103 created a hybrid out of Articles 79 and 80 of the 1928 Articles of War, which had distinguished wrongfully appropriating or failing to safeguard captured property from dealing in captured or abandoned

misconduct as a prisoner were drafted as Articles 87 and 105, respectively, following the experience of World War II.³⁰⁴ Although this conduct was previously tried under the general article, Congress felt that the number and severity of these incidents made it “desirable and necessary to spell out those circumstances and facts in a specific article.”³⁰⁵

From time to time Congress added offenses to Title 10. In 1983, Congress added drug abuse as Article 112a³⁰⁶ in response to escalating drug use in the military in the 1970s and 1980s.³⁰⁷ In 1985, Congress patterned a new UCMJ article after a Title 18 statute when it added Article 106a to create the capital offense of peacetime espionage.³⁰⁸ Prior to this amendment, Article 106 allowed capital punishment for espionage only in time of war. The federal law prohibited espionage in peacetime but it could not be imported into military

property. *United States v. Manginell*, 32 M.J. 891, 892 (A.F.C.M.R. 1991). The offense of desertion, found in UCMJ Article 85, was consolidated from Articles of War 28 and 58 and Articles 4(6), 8(21), and 10 from the Articles for the Government of the Navy. *1949 House Hearings*, supra note 23, at 605 (testimony of Mr. Felix Larkin).

³⁰⁴ *1949 House Hearings*, supra note 23, at 605 (testimony of Prof. Edmund Morgan) and 1258-59 (testimony of Mr. Larkin).

³⁰⁵ *Id.* at 1258 (testimony of Mr. Larkin); see also *id.* at 605 (testimony of Prof. Morgan). In drafting the new Article 87, Congress wanted to distinguish the offense of being absent without authority from the more serious conduct of missing the ship or unit that was headed for possible combat. *Id.* at 1258.

In describing the offense of misconduct of a prisoner, Congress focused on the conduct of a Navy noncommissioned officer, who was accused of maltreating fellow POWs to gain more favorable treatment for himself. *Id.* at 605, 1259. The case involving Petty Officer Hirschberg undoubtedly was in the minds of Congress partly because the case was decided only weeks before the hearings and partly because the Supreme Court held that, despite the fact that Petty Officer Hirschberg re-enlisted with an hours-long break in service, his discharge from his previous enlistment barred trial by court-martial. *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949). Article 3 of the UCMJ ensured that a similar situation would not result in a bar to prosecution.

³⁰⁶ Act of Dec. 6, 1983, Pub. L. No. 98-209, § 8(a), 97 Stat. 1403.

³⁰⁷ Previously, drug offenses were tried under the general article or as a dereliction of duty. See, e.g., *United States v. Gould*, 13 M.J. 734 (C.M.R. 1982). During the initial hearings on the addition of Article 112a, Senator Jepsen's opening statement described as “inconceivable to us” the continuing absence of a specific drug offense article within the UCMJ, considering that drug abuse posed “a most serious threat to military readiness and constitutes a significant percentage of all courts-martial.” *The Military Justice Act of 1982, To Amend Chapter 47 of Title 10, United States Code (Uniform Code of Military Justice), To Improve the Military Justice System, and For Other Purpose: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Comm. on Armed Services*, 97th Cong. 14 (1982) (opening statement by Sen. Roger Jepsen, Subcomm. Chairman), reprinted in UNITED STATES ARMY LEGAL SERVICES AGENCY, INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 1983, at 251 (1984, 1985). At the time, one-third of the cases before the Court of Military Appeals involved a drug offense. See *Hearings on S. 2521*, supra, at 108 (statement by Chief Justice Robinson O. Everett, Court of Military Appeals).

³⁰⁸ *United States v. Wilmoth*, 34 M.J. 739, 741 (C.M.A. 1991).

prosecutions because the Title 18 statute authorized the death penalty. To remedy this gap between Title 18 and Title 10, Congress patterned the new Article 106a after the federal statute "to ensure that the treatment of the substantive offense by courts-martial and military appellate courts will be guided by applicable civilian precedents, including such cases as may arise in the future in the federal system."³⁰⁹ Most recently, Congress added a new Article 119a to make death or injury to a fetus a separate UCMJ offense under certain circumstances.³¹⁰

The reasons for adding those articles are just as applicable here. The offenses prohibited by the War Crimes Act are serious enough to warrant a separate UCMJ article, and the advances in military justice at the trial and appellate level during the past fifty years demonstrates that the services are up to the task of prosecuting war crimes.³¹¹ However, the War Crimes Act differs in one important way from other federal statutes that have been integrated in to the UCMJ: the War Crimes Act expressly reaches the conduct of members of the U.S. armed forces in their role as soldiers, sailors, Marines, and Airmen. More than any other federal statute, the War Crimes Act is directly relevant to a core function of the U.S. military: fighting wars. Unfortunately, as long as the military is involved in armed conflicts, violations of the War Crimes Act will recur. Although Title 18 violations are sometimes

³⁰⁹ *Wilmoth*, 34 M.J. at 742, quoting H.R. CONF. REP. NO. 99-235, at 424-25 (1985), reprinted in 1985 U.S.C.C.A.N. 571, 578.

³¹⁰ The new article is based in part on *United States v. Robbins*, 48 M.J. 745 (A.F. Ct. Crim. App. 1998), *aff'd*, 52 M.J. 159 (C.A.A.F. 1999), in which an Air Force member was convicted of beating his eight-month pregnant wife, thereby causing the death of their child. Apparently there was concern that assimilation of state statutes, which were often silent on the protection of the unborn, would require prosecutors to rely on felony murder laws that Congress viewed as an inadequate response to the crime. See H.R. REP. NO. 108-420 (2004), at n.29, n.37.

Federal statutes have also provided a basis for crimes defined by the President under the authority granted by UCMJ Article 36. The elements and maximum penalty for the Article 134 offense of kidnapping that is now included in the Manual for Courts-Martial were based on a federal statute. *United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984); MCM, *supra* note 10, app. 23, at 21.

³¹¹ See 1949 House Hearings, *supra* note 23, at 644 (statement of Mr. Richard H. Wels, Special Committee on Military Justice, New York County Lawyers' Association).

prosecutable in military courts, importation of the federal offense is not available under all circumstances. The status quo is simply unsatisfactory.

2. Secondary Benefit

Codifying war crimes as an enumerated article of the UCMJ yields secondary benefits beyond the prosecution of offenses under the new articles. Consider the preventive value. Article 137 requires that each enlisted member receive an explanation of the UCMJ—including Articles 77-134—within 14 days after initial entrance on active duty, after completion of six months of active duty service, and when the member reenlists for any additional term of service.³¹² In addition, a copy of the UCMJ must be made available to any member who requests it.³¹³ Codifying the War Crimes Act as part of Title 10 will ensure that the prohibited conduct is incorporated into mandatory training on military law. Military members will know, without a doubt, that war crimes are serious offenses that carry substantial criminal penalties.

Not only would newly enlisted military members receive a briefing about war crimes early in their military service, other mandatory training will be reinforced. The Department of Defense requires all military members to receive training on the law of armed conflict.³¹⁴ Such training necessarily focuses on the substance of the Geneva Conventions and the other obligations referenced in the War Crimes Act. Responding to the abuse scandals emerging out of Iraq, Congress demanded that Department of Defense implement specific policies to ensure that U.S. personnel working in detention facilities receive adequate training.³¹⁵ Once

³¹² Article 137(a), 10 U.S.C. 937(a) (LEXIS through May 5, 2005).

³¹³ Article 137(b), 10 U.S.C. 937(b).

³¹⁴ DOD DIR. 5100.77, *supra* note 235, at paras. 4.1-4.2.

³¹⁵ Section 1092:

The Secretary of Defense shall ensure that policies are prescribed . . . regarding procedures for Department of Defense personnel . . . [that are] intended to ensure that members of the

the War Crimes Act is codified as a separate UCMJ article, the discussion of detained persons may receive greater emphasis within the law of war program.³¹⁶ This can only support Congress's intent.

Commanders and military legal practitioners will benefit from the addition to Title 10. The Manual for Courts-Martial was intended to provide lawyers and non-lawyers with sufficiently comprehensive and understandable guidance about military criminal laws and procedures without having to routinely consult other sources.³¹⁷ Every day, commanders turn to judge advocates for advice on how to properly investigate allegations of misconduct and hold members accountable for breaches of laws, regulations, and discipline. Adding new provisions to the UCMJ can only aid commanders in choosing a course of action and swiftly seeking justice. The new article would directly define the conduct and the maximum penalty and improve a commander's ability to realistically compare and contrast UCMJ war crimes with UCMJ common crimes. The judge advocate can quickly evaluate elements of Title 10 offenses and criminal penalties to make effective disciplinary recommendations. Under the current law, it is certainly possible to make this kind of comparison, but arriving at an answer is convoluted.

Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, treat persons detained by the United States Government in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b).

Pub. L. No. 108-375, § 1092, 118 Stat. 2068 (2004).

³¹⁶ The briefer can reinforce the gravity of breaches of the Geneva Conventions by highlighting the maximum penalties authorized for violations of a new war crimes article.

³¹⁷ MCM, *supra* note 10, app. 21, at 1.

Finally, and no less significantly, adding the War Crimes Act to the UCMJ demonstrates to our own forces and to the world that the U.S. takes its international obligations seriously.³¹⁸

B. The Blanket Sentence Limitation: Amend the General Article to Convert the Bar on Capital Offenses to a Sentencing Limitation

Under another view, Congress could amend clause 3 of Article 134 to authorize importation of *any* federal offense, capital or not, provided that the penalty imposed by a court-martial not include death. This change would convert the bar on prosecuting federal capital crimes into a sentencing limitation.³¹⁹

One benefit is that this proposal requires little amendment to the text of the UCMJ.³²⁰ By changing one sentence within clause 3 of Article 134, courts-martial would be empowered to try any violation of the War Crimes Act, regardless of whether the victim's death resulted from the accused's conduct. Other existing or future federal statutes could be incorporated into trials by courts-martial without the need for additional legislation.

The disadvantages of this approach may outweigh the advantages. First, under this proposal, crimes charged as an imported violation of War Crimes Act would automatically carry a lower maximum punishment under the UCMJ compared to prosecutions in federal courts. Where a federal prosecution could impose the death penalty, the trial by court-martial could not. This may cause the U.S. to face criticism for failing to assess appropriate criminal

³¹⁸ When he was the commanding general of the 1st Marine Division, Lieutenant General James N. Mattis directed investigations into numerous detainee abuse allegations and commented on prisoner abuse as a serious crime: "We cannot lose our humanity. . . . We are Americans and we should act like it at all times. Americans don't do things like this." *Troops Discharged for Beating Iraqis*, AUSTRALIAN (Queensland), Jan. 7, 2004, at 6.

³¹⁹ An alternate possibility under this proposal is to build in a sentence "cap." If the conduct alleged would authorize the death penalty under the federal statute, the new clause 3 of Article 134 could authorize a maximum penalty of 30 years of confinement or life with the possibility of parole.

³²⁰ The discussion following Rule for Courts-Martial 307(c)(2) would also need to be amended to reflect the possibility of charging certain law of war crimes as incorporated crimes under Article 134. MCM, *supra* note 10, R.C.M. 307(c)(2) (Discussion).

responsibility and continuing with a policy of subjecting military members to a forum that provides a lower maximum punishment.

Second, if the alleged war crime violation is serious enough, military authorities may find the new sentence limitation of Article 134 inadequate to fulfill prosecutorial goals. To compensate for the sentence limitation, the military may revert to the status quo. Instead of importing Title 18 offenses through the general article to charge war crimes, military authorities may favor prosecution of crimes defined by Title 10 to allow for the possibility of capital punishment. Therefore, the sentence limitation proposed under this view provides little incentive to try offenders as war criminals. The DoD may likely continue to rely on enumerated articles and the body of case law to charge common crimes, such as murder, manslaughter, or aggravated assault, even when the conduct “might amount to”³²¹ grave breaches of the Geneva Conventions.

**C. A Partial Exemption for Title 18 Capital Offenses: Amend Article 134
to Lift the Bar on Capital Crimes Only for Clause 3 Offenses**

Instead of transforming Article 134’s jurisdictional prohibition on prosecuting capital offenses into a blanket sentencing limitation, another option could be to lift this bar only under certain qualifying circumstances. Instead of turning the “crimes and offenses not capital” provision into a broad sentencing limitation, Congress could amend the general article to authorize the incorporation of federal capital offenses into courts-martial *only* under clause 3 of Article 134. This differs from current law, which prohibits charging capital crimes under any of the three clauses of the general article. This also differs from the prior proposal in that prosecution of clause 1 and 2 violations that are based on Title 18 capital

³²¹ *Supra* note 267.

offenses would remain barred, *unless* they are lesser included offenses of the clause 3 offense.

In drafting a *partial* exemption to accommodate federal capital crimes under clause 3, Congress must be aware of the potential for a conviction of a lesser included offense under clause 1 or 2. If the jurisdictional bar were lifted only for clause 3 offenses without further comment, such an amendment may not necessarily permit the conviction of lesser included offenses. Because the clause 1 or 2 offense derives its subject matter from the imported Title 18 capital crime (the clause 3 offense), the lesser included offense (under clause 1 or 2) would lack subject matter jurisdiction unless the amendment proposed here addresses the relationship between the parent charge and its lesser included offenses.

Allowing convictions of the lesser offenses is not the same as lifting the jurisdictional bar altogether, nor does it expand Article 134's existing provision in clause 3 that allows the import of only those crimes of local application. If the federal statute lacks territorial application where the crime was committed, existing law precludes its importation under clause 3, but may allow prosecution under clause 1 or 2.³²² This does not change under this proposed option. When importation through clause 3 is unavailable, there would be no need to apply the proposed clause 3 exemption. Lifting the ban on charging capital crimes solely with respect to clause 3 offenses (and their clause 1 and 2 lesser included offenses) would affect only those Title 18 crimes that 1) authorize the death penalty *and* 2) apply federal jurisdiction over the offense at the location where the offense was committed.

Using the statute implementing the Convention Against Torture as an example,³²³ under existing law, the federal crime of torture occurring outside of the U.S. which did not

³²² See *supra* section V.B.

³²³ 18 U.S.C. § 2340A (LEXIS through May 5, 2005).

result in the victim's death may be incorporated through Article 134 as a clause 3 offense. Because the clause 3 offense is importable, clause 1 and 2 are available to derive lesser included offenses. If the same act of torture occurred within the U.S. where the law does not apply, the statute may not be incorporated under clause 3, but clause 1 and 2 remain available as standalone charges. If the crime of torture occurring outside of the U.S. results in the death of the victim—which triggers the death penalty in the Title 18 statute—existing law precludes its incorporation under clause 3 as well as its use of the federal statute as a basis for a standalone charge under clauses 1 and 2. Under the proposal in this section, this same crime of torture that causes the victim's death would no longer be barred; the offense could be incorporated under clause 3, along with any clause 1 and 2 lesser included offenses, and tried as a capital crime.

A partial exemption to the bar of bringing Title 18 capital crimes into Title 10 through the general article would certainly broaden the field of federal crimes which are chargeable under the UCMJ. Without narrowing the exemption further, Congress may find that even a partial exemption is too broad. If the aim is to lift the existing restrictions on military trials and allow prosecutions of Title 18 capital *war* crimes versus other Title 18 capital *common* crimes, any UCMJ amendment could be sufficiently tailored to specifically list only those federal statutes to which the partial exemption applies.

This is similar to an idea proposed by Judge Everett when the War Crimes Act legislation was under review. After testifying at the 1996 hearings on the original bill that became the War Crimes Act, Judge Everett wrote a letter to the subcommittee recommending the addition of a fourth clause to Article 134. His proposal reaches the same end as the partial exemption described in this section, but through a different means. Specifically,

Judge Everett would give courts-martial jurisdiction under Article 134 to punish “any conduct which constitutes a violation of the War Crimes Act of 1996, as it may be at the enactment of this law or as it may be hereafter amended.”³²⁴ If Congress pursues this variation, it should be clear that the existing limitation on charging capital offenses under clauses 1, 2, and 3 would not apply to the new clause 4.

One final note, under either Judge Everett’s proposal or the partial exception affecting clause 3, any changes to the limitation on capital punishment should be explicitly addressed. Article 18 limits a court-martial’s imposition of the death penalty only to instances under the UCMJ where it is specifically authorized. Changing the general article or clauses 3 or 4 may not automatically allow for imposition of the corresponding maximum federal penalty, unless Congress provides a clear intent regarding capital punishment.

D. Amend the Title 18 to Eliminate Capital Punishment for War Crimes

When federal crimes do not authorize capital punishment, there is no subject matter barrier to incorporating federal criminal statutes into UCMJ prosecutions. If the War Crimes Act or anti-torture statute did not allow the death penalty, there would be no obstacle to charging these crimes through clause 3 of Article 134. Thus, one proposal to place military and federal prosecutions on similar footing is to eliminate the capital punishment provisions within the federal statutes.

This idea is not novel to the prosecution of war crimes. During the hearings on the War Crimes Act, Judge Everett recommended removing the provisions on capital punishment from the proposed legislation.³²⁵ The objection stemmed from widespread international opposition to the death penalty and the obstacle it had created in delivering persons suspected

³²⁴ *War Crimes Act Hearings*, *supra* note 165, at 50.

³²⁵ *Id.* at 21-22.

of capital offenses to the authority of the United States.³²⁶ Another witness made the same recommendation based on concerns that European countries have refused to extradite suspects because of objections to capital punishment.³²⁷ Yet, in passing the War Crimes Act with the provision for capital punishment intact, Congress obviously felt that any disadvantages that may accrue were outweighed by the benefit of ensuring that the death penalty would serve both as a deterrent and as punishment.

The benefit under this view is that it would require no amendment to Title 10. However, to fully accomplish the goals of bringing war crimes—whether defined in the War Crimes Act or other Title 18 provisions—into the jurisdiction of courts-martial, other Title 18 statutes would require similar amendments to remove the capital punishment provisions.³²⁸

Two major factors weigh against this proposal. First, it would remove a serious penalty for “the most heinous crimes that one could imagine.”³²⁹ Second, it would push war crimes downward in the hierarchy of offenses. By virtue of a lesser punishment, war crimes would become less severe than those domestic common crimes, such as murder, that still carry the death penalty.

E. Prosecute Military Members under the Laws of War by Military Commissions

The roots of Article 18 pre-date the War Crimes Act, the Geneva Conventions, and the UCMJ. The motivation for giving the general court-martial the additional duty of

³²⁶ *Id.* at 23-24. Everett specifically noted that, although there was ample law of war precedent for imposing the death penalty, the international criminal tribunals in Yugoslavia and Rwanda lack jurisdiction to impose the capital punishment. *Id.* at 23.

³²⁷ *Id.* at 31, 41-43 (testimony of Mark Zaid, Chair, American Bar Association Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals).

³²⁸ Included among the statutes potentially affected by this proposal are: 18 U.S.C. § 1091(b) (LEXIS through May 5, 2005) (genocide); 18 U.S.C. § 116(a) (killing an internationally protected person); 18 U.S.C. § 1203(a) (hostage taking); 18 U.S.C. § 2332(a) (terrorism); and 18 U.S.C. § 2332a(a) (use of certain weapons of mass destruction).

³²⁹ *War Crimes Act Hearings*, *supra* note 165, at 19 (statement of Mr. Matheson, who went on to comment, “And if any crime deserves this penalty or the possibility of such penalty, then it’s this one.”).

functioning as a military commission appears to have been the desire to ensure that offenders would not escape appropriate punishment—especially for law of war violations—because of lack of coverage of local or military law. Thus, Article 18 in theory could be used to prosecute an offense against a U.S. military member independently of the federal statute or the limitations of Article 134.

Some scholars suggest that, under the UCMJ, U.S. military members tried by military commission as readily as other offenders under the law of war.³³⁰ One argument notes that prisoners of war can be tried by a military commission for law of war offenses as long as Geneva Conventions requirements were met, and thus by analogy the use of the military commission would apply to U.S. service members, as long as those same Geneva Convention due process requirements are met.³³¹ Another argument is that *Ex Parte Quirin* allows the trial by military commission of any member of the U.S. military, particularly as a means of ensuring the U.S. a response to an enemy's infiltration into our military.³³² Regrettably,

³³⁰ Bickers, *supra* note 67, at 922 n.160 (2003); H. Wayne Elliot, *POWs or Unlawful Combatants: September 11th and Its Aftermath*, Crimes of War Project, Jan. 2002 at <http://www.crimesofwar.org/expert/pow-elliott.html> (last visited Mar. 4, 2005). See also UNITED STATES LEGAL HISTORY AND BASIS, MANUAL FOR COURTS-MARTIAL 14-15 (1951) (noting that the Army Judicial Council indicated that soldiers may be tried by military commissions for violations of the laws of war and citing 1915 congressional testimony of the Army Judge Advocate General to show that the concurrent jurisdiction embodied in the current Article 21 was intended to give field commanders a convenient choice to use a military commission or a court-martial).

³³¹ Lieutenant Colonel (Ret.) Elliot, the former Chief of the International Law Division at the U.S. Army Judge Advocate General School, wrote: "An American soldier can be tried before a military commission. Our policy is to try our soldiers accused of acts which violate the law of war in a court-martial, but that's all it is—a policy—not a matter of law. The military commission would have to meet the requirements of the Geneva Conventions, but the difference between a military commission and a court-martial is that a court-martial must meet all of the requirements of the US Constitution for a trial and that could include all of the evidentiary rules, while a military commission does not." Elliot, *supra* note 331.

³³² Bickers, *supra* note 67, at 922 n.160. In this context, Bickers refers to the fact that non-citizens may serve in the U.S. military, however, even recent history shows that espionage is not limited to non-U.S. citizens. In September 2004 a U.S. Army specialist was convicted of five specifications attempting to provide aid and intelligence to Al Qaeda; he was sentenced to confinement for life with the possibility of parole, reduction to the rank of private, and a dishonorable discharge. Ray Rivera, *Fort Lewis Court-Martial Begins: Soldier Accused of "Betrayal," Trying to Help al-Qaida Terrorists, Defense Says Man Had Mental Problems*, SEATTLE TIMES, Aug. 31, 2004, at B3; *U.S. Soldier Gets Life for Aiding al-Qaida*, SUNDAY MAIL (Queensland), Sep. 5, 2004, at 46.

these arguments fail to acknowledge that the use of military commissions in this way is untested under modern military law, nor do they fully analyze the potential impact of the UCMJ as transformative law. Since *Quirin* was decided, Congress introduced sweeping and constitutionally significant reforms in the administration of military justice. Instead of asking whether the UCMJ bars the trial of U.S. service members by military commission, it may be more appropriate to consider whether Congress intended to give Title 10 court-martial jurisdiction primacy over military commissions for U.S. military personnel who commit war crimes.

The legislative history of the UCMJ distinguished U.S. service members from other categories of persons in two ways. First, the design behind the UCMJ was to provide an accused, primarily the U.S. soldier, with fairness in the administration of military justice and greater protections against arbitrary command control and influence.³³³ The protections guaranteed by the UCMJ were intended to closely resemble those afforded under the U.S. civilian court system. The UCMJ was aimed at ensuring that U.S. military members receive the type of due process that flows from Constitution—the very document that all U.S. service members have sworn to support and defend. In short, Congress wanted to ensure that our soldiers received the benefit of what they were fighting for.³³⁴ In contrast, POWs and the

One U.S. district court went a step further than Bickers' discussion: "Under *Quirin*, citizens and non-citizens alike—whether or not members of the military, or under its direction or control, may be subject to the jurisdiction of a military commission for violations of the law of war. *Mudd v. Caldera*, 134 F. Supp. 2d 138, 145-46 (D.D.C. 2001), *appeal denied and case dismissed by Mudd v. White*, 309 F.3d 819 (U.S. App. D.C. 2002). The descendants of Dr. Samuel Mudd, who was convicted by a military commission and sentenced to death for his role in the assassination of President Lincoln, sought judicial review of the U.S. Army's refusal to overturn Dr. Mudd's conviction. However, the district court's remarks were later relegated to mere supposition when the appeals court declined to address the merits and dismissed the case for lack of standing. 309 F.3d at 823-24.

³³³ See 1949 House Hearings, *supra* note 23, at 616, 634-35.

³³⁴ See Representative Philbin's comment, *supra* note 32, on the need for a uniform code that safeguards the rights of U.S. citizens "who happen to be in the armed forces." Even U.S. military members who have directly offended the oath of allegiance have been tried by a court-martial instead of a military commission. See, e.g.,

other categories of persons traditionally covered by military tribunals are under no similar obligation of allegiance. This purpose and rationale behind the UCMJ protections do not apply in the same to trials of prisoners of war, because the reasons for granting procedural protections for POWs derive from the laws of war and international custom, not from a desire to extend those due process protections found in the U.S. Constitution.

Second, although Article 21 expressly rejects the notion that general courts-martial preempt the use of military commissions,³³⁵ the U.S. service member was the only class of persons for which there was doubt about the applicability of military commissions.³³⁶ By custom, the military commission lacked jurisdiction over a purely military offense.³³⁷ In theory, then, the military member remains vulnerable for trial by military commission for offenses not defined in Title 10. The authority of the military commission in this context is

U.S. v. French, 27 C.M.R. 245 (C.M.A. 1959); *U.S. v. Northrup*, 31 C.M.R. 599 (A.F.B.R. 1961); Rivera, *supra* note 332; *U.S. Soldier Gets Life for Aiding al-Qaida*, *supra* note 332.

Despite the legislative history's lack of clear intent, Article 18 allows the prosecution of U.S. service members by a military commission for violations of Articles 104 and 106 because that possibility is specifically listed in the code. UCMJ Articles 104 (aiding the enemy) and 106 (spying) are the only punitive articles that criminalize the acts of "any person" rather than limit their scope to persons subject to the UCMJ. These are also the only two punitive articles that specifically authorize trial by either a court-martial or a military commission. Because these unique provisions appear in the same two articles, "[t]he logical conclusion from such language is that in these two offenses Congress wanted to give military commanders the authority to try accused persons by court-martial if they were subject to the jurisdiction of that forum and by military commission if they were not." Bickers, *supra* note 67, at 920.

The possible trial of a U.S. service member by military commission under these narrow circumstances does not *itself* support the proposition that U.S. military members are subject to trial by military commission without qualification. Such an argument compares apples and oranges. The two offenses singled out in the UCMJ, spying and aiding the enemy, are not offenses that violate the laws of war, and as such, they are ineligible to be tried by a military commission pursuant to military jurisdiction under *the laws of war*. However, as part of congressionally approved text of the UCMJ, trials are authorized as an exercise of jurisdiction under statutory military law. If Congress had intended to deprive U.S. military members of trials by courts-martial for these espionage offenses, it might have deleted altogether the language authorizing courts-martial for violations of Articles 104 and 106. Interpreting the UCMJ provisions in favor of protecting the U.S. military member through a trial by court-martial provides an adequate balance between protecting the rights of U.S. service members, as the UCMJ aimed to do, and the fulfilling desire to prosecute infiltrators and enemy agents, *see* Bickers, *supra* note 67, at 922 n.160, as military commissions were intended to do.

³³⁵ Military law does not preempt the jurisdiction of civilian courts, either. A military member's prosecution in civilian court is permissible even when the UCMJ would cover the same offense. *Rudoll v. Collieran*, 2003 U.S. Dist. LEXIS 14337 (E.D. Penn. 2003), *citing Caldwell v. Parker*, 252 U.S. 376 (1920)

³³⁶ *See supra* text accompanying notes 92-94.

³³⁷ UNITED STATES LEGAL HISTORY AND BASIS, *supra* note 330, at 15; WINTHROP, *supra* note 12, at 841.

tenuous considering that violations of the law of war may now likely be covered by the Title 18, giving the federal government jurisdiction to try the offense. When there is an available avenue for prosecution of a U.S. service member, there seems to be little or no justification to resorting to the military commission. The absence of congressional debate on this issue leaves open the question whether military commissions provide a viable alternate prosecutorial forum in light of the protections the UCMJ sought to grant.

Congressional intent on this issue is murky, at best. The legislative history of the UCMJ shows that military commissions, at least under the post-UCMJ view, were intended to cover classes of persons other than U.S. armed forces. In 1949, Congress specifically discussed the possible contradictions contained in Article 18 as they potentially affected U.S. armed forces and, to use one example, the comments about imposing the death penalty in military commissions was a specific concern if applied to U.S. service members, not the other persons triable under the laws of war. The logical conclusion is that Congress intended to treat U.S. military members differently than other persons “who by the law of war [are] subject to trial by a military tribunal.”³³⁸

The protections afforded by the Bill of Rights, except those that are inapplicable by the text of the Constitution³³⁹ or by “necessary implication,” are available to members of the U.S. armed forces.³⁴⁰ Using a military commission to try a military member for a violation of the Geneva Conventions—a violation that is otherwise unavailable as a chargeable offense under the UCMJ—is an end run around the limitations of Article 134 (and federal law) and

³³⁸ The conclusion on capital punishment is that Congress precluded a general court-martial, under either sphere of competence, from imposing the death penalty on a U.S. service member unless it is specifically authorized by the punitive articles in the UCMJ. Judge Robinson echoed this conclusion in his 1996 testimony, *supra* note 200 and accompanying text.

³³⁹ The requirement of a grand jury indictment is not required for “cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger . . .” U.S. CONST. amend. V.

³⁴⁰ *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

may deny rights that the UCMJ sought to ensure for the accused U.S. service member. In such a case, the question becomes one of separation of powers. Although the President enjoys great deference in the exercise of his authority as Commander-in-Chief,³⁴¹ such deference has its limits. The President's authority to establish a military commission exists through a congressional grant of authority; it is not a power inherent in the presidency or role as Commander-in-Chief.³⁴² Upon a challenge to the limits of such Commander-in-Chief powers, it is doubtful that the courts would find the issue nonjusticiable.³⁴³ If the military commission were used to circumvent those protections found in courts-martial and federal civil prosecutions that safeguard the basic rights of an accused, the chance that the use of a military commission would be upheld diminishes.³⁴⁴

The strongest argument against the use of military commissions to try U.S. military person requires a macro-level evaluation of the purpose and intent of the UCMJ. It would be misguided to focus on the second sentence of Article 18 when the major reforms of the UCMJ sought to remove command influence and provide rights to an accused that paralleled that of civilian society: appointment of defense counsel who is a lawyer, the use of civilian courts as a model for courts-martial, and the review by a court of appeals comprised of civilian appointees.³⁴⁵ The use of a military commission to try a U.S. service member,

³⁴¹ *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2nd Cir. 2003), *rev'd and remanded*, *Rumsfeld v. Padilla*, 542 U.S. ___, 124 S. Ct. 2711 (2004).

³⁴² *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 158-59 (D.D.C. 2004).

³⁴³ "Where the exercise of Commander-in-Chief powers, no matter how well-intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts." *Hamdi v. Rumsfeld*, 352 F. 3d at 713 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

³⁴⁴ See *Jacoby*, 29 C.M.R. 244 (applying the Sixth Amendment right to confrontation to written depositions taken pursuant to Article 49 of the UCMJ); *Burns v. Wilson*, 346 U.S. 137 (1953) (suggesting that court-martial proceedings could be challenged in federal courts through a habeas corpus action).

³⁴⁵ See *supra* notes 29-30 and accompanying text; 1949 *House Hearings*, *supra* note 23, at 606 (testimony of Prof. Morgan); S. REP. NO. 81-486, at 104 (1950), 1950 U.S.C.C.A.N. 2222-26.

despite the capability of the federal courts to prosecute the offense, disregards the protections that Congress believed were crucial to the success of the military.³⁴⁶

The impetus behind the first uses of the military commission, its targeted scope, and its customary application all support the proposition that the military commission was not intended as a forum to try U.S. service members when Title 18 or Title 10 defines crimes that have jurisdiction over the offense.³⁴⁷ Perhaps the reason why the legislative history of the UCMJ failed to directly address the question of the continuing applicability of the military commission to active duty U.S. military personnel was because the answer was obvious. Authorizing unfettered executive-driven jurisdiction over a U.S. military member in a forum that could remove many congressionally created protections is the ultimate form of the command “domination and control”³⁴⁸ of military justice that Congress sought to dismantle by enacting the UCMJ.

³⁴⁶ In his testimony before Congress, Frederick P. Bryan, Chairman of the Special Committee on Military Justice of the Bar Association, linked the efficiency of the military to the morale of the individual soldier and tied both to the proposed legislation to create the UCMJ:

[W]e have to realize, gentlemen . . . that the American armed services are no longer the old type of professional Army. They are citizen armed services. Their fighting capacity is dependent on morale. And those gentlemen of you who have heard some of the gripes . . . are familiar with the criticism that has arisen from men subject to the old court-martial system. In my judgment it was not conducive to the best morale. Morale will never be so high as when the individual American soldier or sailor or airman is convinced that he is going to get a fully square deal if he is accused of a crime or offense and that he is going to be tried under a system of justice which is in accord with the traditional philosophy to which he has been accustomed. That is not going to interfere with his military efficiency. Far from doing that, it is going to increase his military efficiency.

1949 *House Hearings*, supra note 23, at 630. Richard B. Wells, Chairman of the Special Committee on Military Justice of New York County Lawyers' Association, echoed this comment a short time later, when he testified:

We believe that discipline is dependent in large degree upon the morale of the men who make up the services, and we do not believe that there can be good morale when men feel that the service courts which are set up to do them justice are not real and fair courts as we think of them here in America.

Id. at 641.

³⁴⁷ See *supra* section II.B.2.

³⁴⁸ 1949 *House Hearings*, supra note 23, at 634.

IX. CONCLUSION

Although the Title 18 war crimes available to military prosecutors for charging offenses that violate the laws of war, only a change in the UCMJ will make this an effective tool for military practitioners. Fifty years after ratifying the Geneva Conventions and after the generation of multiple international criminal tribunals, it is clear that prosecutions of the laws of war receive serious international attention. It is time to apply the gains made in international humanitarian law to the code that regulates the conduct of our soldiers, sailors, Airmen, and Marines.

The goals of imposing individual criminal liability and encouraging state responsibility are best met by integrating the international crimes and war crimes of Title 18 directly into Title 10. First, codification of war crimes in the UCMJ allows Congress to specifically authorize the death penalty as a punishment, clearing the obstacles otherwise imposed by Articles 18 and 134. Second, adding new articles to the UCMJ aids commanders and judge advocates in making timely decisions about drafting charges and choosing a disciplinary forum that is appropriate to the offenses. Finally, this recommendation directly supports DoD's law of war program in a preventive way. Because the UCMJ articles must be periodically explained to every enlisted member, awareness of our international obligations can only increase.

When Congress passed the War Crimes Act, the focus was on the treatment of U.S. military members as victims of war crimes in armed conflicts. With reports of detainee abuse, excessive use of force, and other misconduct of military members appearing in newspapers and news reports on a regular basis, the reality is that the U.S. military member is sometimes portrayed as a perpetrator of war crimes. Federal law took a step in the right direction in showing the world that the U.S. is able and willing to seek appropriate justice

when war crimes are committed. But Congress did not go far enough. It is time to get out the blue pencil and take a fresh look at the UCMJ. Congress now needs to update the military's toolbox to allow courts-martial to meaningfully try war crimes.

APPENDIX 1

Proposed New Article 102 of the UCMJ¹

Article 102² – War Crimes

a. Text.³

(a) Any person subject to this chapter who commits a war crime as defined in subsection (b) shall be punished as a court-martial may direct, except that in cases of rape and cases in which the victim's death results from conduct described in subsection (d)(1)(A), the accused shall be punished with death or such other punishment as a court-martial may direct.⁴

(b) Definitions.⁵ As used in paragraph (a), the term “war crime” means any conduct—⁶

¹ The purpose of this proposed Article is to 1) align the Uniform Code of Military Justice (UCMJ) with existing provisions in U.S. federal criminal law that address war crimes, 2) reflect within Title 10 the gravity of war crimes committed by U.S. service members, and 3) provide a stronger showing of state responsibility within the international community by providing the U.S. armed forces the means to prosecute offenders as war criminals within the military justice system.

² Article 102 presently describes the offense of forcing a safeguard. 10 U.S.C. § 902 (2005). Two factors call into question the continuing relevance of the existing Article 102: 1) the lack of reported cases involving prosecutions under this article and 2) the entrance of treaties into force that cover substantially the same subject matter. *Compare* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 664 n.98 (photo. reprint 1988) (1920) (describing how safeguards are protections given to foreign property or persons, usually hospitals, post offices, public institutions, museums, and “establishments of religion, charity, or instruction”) *with* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, arts. 25 and 27, 36 Stat. 2277, 2303-09 [hereinafter *Hague Convention*] (generally prohibiting attacks on undefended buildings and hospitals, buildings dedicated to religion, art, science, or charitable purposes, and historic monuments that are not used for military purposes).

³ In the Manual for Courts-Martial, the first section of a UCMJ article repeats the text of the Title 10 statute. *See generally* UNITED STATES, *MANUAL FOR COURTS-MARTIAL* pt. IV (2002) [hereinafter *MCM*].

⁴ This text is modeled on the language of 18 U.S.C. §2441(a) (2005). Congress has previously promulgated new UCMJ articles based on existing federal statutes. *See, e.g., United States v. Wilmoth*, 34 M.J. 739, 741 (C.M.A. 1991).

⁵ Congress is not limited to a short paragraph in defining the UCMJ offense. Article 99 (misbehavior before the enemy) contains nine subparagraphs of prohibited conduct. In Articles 106a (espionage) and 119a (death or injury of an unborn child), two UCMJ articles patterned after federal statutes, Congress included substantial detail in establishing the parameters or definitions of the offense within the text of the statute.

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party,⁷ including, but not limited to, the following acts against persons or property protected under these conventions:

(A) willful killing,⁸ as described by sections 918 and 919(a) of this title;⁹

⁶ This proposed subsection describes in further detail the offenses identified in the War Crimes Act. 18 U.S.C. § 2441(c). The Manual for Courts-Martial is intended to and serve as a sufficiently comprehensive, accessible, and understandable source for lawyers and non-lawyers. See MCM, *supra* note 3, app. 21, at 1; *Uniform Code of Military Justice: Hearings on H.R. 2498 before the House Subcomm. on Armed Services*, 81st Cong. 600 (1949) (testimony of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense). In this context and compared to the federal criminal statute, the greater detail and description of offenses in new Article 102 is warranted.

Prior codifications of grave breaches of the Geneva Conventions appear in the Statute of the Iraqi Special Tribunal, which was enacted on December 10, 2003, through an order by the U.S. Administrator for the Central Provisional Authority; the Statute of the International Criminal Tribunal for the Former Yugoslavia, which was adopted in 1993 with a supporting vote by the United States and subsequently amended through a series of United Nations Security Council resolutions, the Statute of the International Tribunal for Rwanda, adopted in 1994 with the support of the United States and subsequently amended through a series of United Nations Security Council resolutions; and the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002. Statute of the Iraqi Special Tribunal, *adopted by and annexed to* Coalition Provisional Authority Order No. 48, Dec. 10, 2003, at <http://www.iraqcoalition.org/regulations/> [hereinafter IST Statute]; Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter ICC Statute]; Statute of the International Criminal Tribunal for Rwanda (as amended), *adopted by and annexed to* S.C. Res. 955, U.N. Doc. S/RES/955 (1994), at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> [hereinafter ICTR Statute, Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), *adopted by and annexed to* S.C. Res. 827, U.N. Doc. S/RES/827 (1993), at <http://www.un.org/icty/legaldoc/index.htm> [hereinafter ICTY Statute].

Prior to the enactment of any of these international statutes, the U.S. Army incorporated the protections found in the Geneva and Hague Conventions into its official publications as guidance for military personnel. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 18, 1956) (C1, July 15, 1976) [hereinafter FM 27-10]. The Field Manual provides portions of the text of ratified treaties, organized by subject, as well as statements of customary law, custom, and practice. *Id.*, at paras. 1 and 7. For a recent survey of customary international law of armed conflict, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 1 (2005).

⁷ This language is repeated verbatim from 18 U.S.C. sec. 2441(c)(1). The Geneva Conventions referred to are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

⁸ Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147. See IST Statute, art. 13(a)(1); ICTY Statute, art. 2(a); ICC Statute, art. 8(2)(a)(i); FM 27-10, *supra* note 6, para. 502.

(B) torture,⁹ as defined by 18 U.S.C. sec. 2340A,¹¹ or inhuman treatment, including biological experiments,¹² acts described by section 893 of this title,¹³ and offenses defined under section 934 of this title promulgated under an Executive Order¹⁴ described as indecent acts with another, indecent assault, reckless endangerment, and assault with intent to commit murder, rape, or voluntary manslaughter;¹⁵

⁹ This draft Article incorporates existing UCMJ provisions that contain elements of offenses described by the Geneva Conventions. This approach is beneficial in two ways. First, many crimes in this proposed Article correspond to offenses that already exist in Title 10 or which have been promulgated under presidential authority. In such cases, the new Article 102 crimes primarily add the element that the conduct must occur within the context of a qualifying armed conflict. Thus, common crimes that exist in the current UCMJ become lesser included offenses of the crimes described in the new Article 102. Second, it allows practitioners to rely on existing UCMJ case law relevant to the underlying common crimes.

¹⁰ Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(2); ICTY Statute, art. 2(b); ICC Statute, art. 8(2)(a)(ii); FM 27-10, *supra* note 6, para. 502.

¹¹ Definitions from federal statutes should be incorporated rather than repeated to allow for automatic incorporation of any amendments of the federal statute.

¹² Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(2); ICTY Statute, art. 2(b); ICC Statute, art. 8(2)(a)(ii); FM 27-10, *supra* note 6, para. 502.

¹³ Inclusion of this language and reference to UCMJ Article 93 is intended to reach the type of conduct that was the subject of the Abu Ghraib prison scandal and charged under UCMJ Article 93. *See, e.g.,* U.S. Dep't of Defense, DD Form 458, Charge Sheet, Mar. 20, 2004, *for* Sergeant Javal Davis, *available at* <http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html> (last visited May 14, 2005); Staff Sergeant Ivan "Chip" Frederick, Jr., *available at* <http://news.findlaw.com/hdocs/docs/iraq/ifred32004chrg.html> (last visited May 14, 2005); Specialist Charles Graner, *available at* <http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html> (last visited May 14, 2005); *and* Specialist Jeremy Sivitz, *available at* <http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html> (last visited May 14, 2005).

¹⁴ The inclusion of Article 134 refers to offenses created by presidential authority under Article 36 of the UCMJ. *See generally* MCM, *supra* note 3, pt. IV, ¶¶61-113. It is unusual for a congressionally defined statute to include reference to offenses defined under an act of presidential authority, however such reference does not alter the elements of the Article 134 offenses.

¹⁵ Inclusion of these offenses by specific reference is warranted following allegations that have surfaced during the recent conflicts in Iraq and Afghanistan which describe Article 134 offenses. *See, e.g.,* Monte Morin, *The World: G.I. Gets Eight-Year Sentence After Guilty Plea in Abuse Scandal*, L.A. TIMES, Oct. 22, 2004, at A4 (indecent acts charged in Abu Ghraib trial); *Charges Reduced in Iraq Killings: A Captain Will Stand Court-Martial on Counts of Dereliction of Duty Instead of Murder in What Was Called "A Mercy Killing,"* L.A. TIMES, Dec. 8, 2004, at A3 (assault with intent to commit murder referred to trial in the case of an Army captain accused of shooting wounded Iraqi); *U.S. Soldier Avoids Jail in Killing*, WASH. POST, Apr. 2, 2005, at A15 (reporting on the conviction of the Army captain for assault with intent to commit voluntary manslaughter). However, using non-exclusive language and allowing any offense defined pursuant to Article 36 could make the new Article 102 too broad, because it could elevate even simple disorders to the status of war crimes.

It may be preferable to list the executive-defined Article 134 offenses in the statute to avoid including those offenses that carry a criminal responsibility lower than the threshold for war crimes. For example, reckless endangerment, another executive-created Article 134 offense, has a *mens rea* (reckless or wanton) commensurate with that of other listed war crimes, whereas the Article 134 offense of negligent homicide imposes criminal liability under a lower standard of culpability (simple negligence). The former may be appropriate for inclusion in a new UCMJ article governing war crimes, where the latter is not.

(C) willfully causing great suffering, or serious injury to body or health;¹⁶

(D) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;¹⁷

(E) compelling a prisoner of war or other protected person to serve in the forces of a hostile power;¹⁸

(F) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;¹⁹

(G) unlawful deportation or transfer;²⁰

(H) unlawful confinement,²¹ including acts described by section 897 of this title,²² or taking of hostages.²³

¹⁶ Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(3); ICTY Statute, art. 2(c); ICC Statute, art. 8(2)(a)(iii); FM 27-10, *supra* note 6, para. 502.

¹⁷ Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(4); ICTY Statute, art. 2(d); ICC Statute, art. 8(2)(a)(iv); FM 27-10, *supra* note 6, para. 502. Two UCMJ articles define conduct that could fall under this subsection: Article 109 (willful or reckless damage to or destruction of property other than property of the U.S. military) and Article 126 (arson).

¹⁸ Geneva Convention III, art. 130; Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(6); ICTY Statute, art. 2(e); ICC Statute, art. 8(2)(a)(v); FM 27-10, *supra* note 6, para. 502.

¹⁹ Geneva Convention III, art. 130; Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(5); ICTY Statute, art. 2(f); ICC Statute, art. 8(2)(a)(vi); FM 27-10, *supra* note 6, para. 502.

²⁰ Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(8); ICTY Statute, art. 2(g); ICC Statute, art. 8(2)(a)(vii); FM 27-10, *supra* note 6, para. 502.

²¹ Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(7); ICTY Statute, art. 2(g); ICC Statute, art. 8(2)(a)(vii); FM 27-10, *supra* note 6, para. 502.

²² Again, the elements and explanation of the common crime of unlawful confinement under UCMJ Article 97 may be used to define the war crime of unlawful confinement. *See* MCM, *supra* note 3, pt. IV, ¶21.b-c. If the war crime of unlawful confinement is based on Article 97, the newly defined crime adds the element that the conduct occurs within the context of a qualifying armed conflict against a protected person. If all other elements remain the same, Article 97 can be a lesser included offense of the newly drafted war crime.

²³ Geneva Convention IV, art. 147. *See* IST Statute, art. 13(a)(9); ICTY Statute, art. 2(h); ICC Statute art. 8(2)(a)(viii); FM 27-10, *supra* note 6, para. 502. Hostage taking is defined in U.S. federal criminal law at 18 U.S.C. sec. 1203 (2005), and the statute could be incorporated into the new UCMJ Article by reference. Although section (a) of the Hostage Taking statute provides an operative definition of the crime, section (b) generally exempts conduct occurring outside of the United States. However, an exception under 18 U.S.C. sec. 1203(b)(1)(A) allows prosecution of the crime when the offender is a national of the United States, even when the conduct occurs outside of the United States. Thus, it appears that this language already criminalizes hostage taking by U.S. service members.

(2) prohibited by Articles 23, 25, or 27²⁴ of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907,²⁵ including—

(A) the employment of poison or poisoned weapons;²⁶

(B) killing or wounding treacherously individuals belonging to the hostile nation or army;²⁷

(C) killing or wounding an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;²⁸

(D) declaring that no quarter will be given;²⁹

(E) employing arms, projectiles, or material calculated to cause unnecessary suffering;³⁰

(F) improperly using of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention, resulting in death or serious injury;³¹

²⁴ As looting and pillaging of captured or abandoned property are covered by UCMJ Article 103(b)(3), this draft article omits specific references to Article 28 of the Hague Convention.

²⁵ With the exception of the omission discussed in note 24, *supra*, the language repeats verbatim the text of 18 U.S.C. sec. 2441(c)(2).

²⁶ Hague Convention, art. 23(a). See IST Statute, art. 13(b)(18); ICTY Statute, art. 3(a); ICC Statute, art. 8(b)(xvii); FM 27-10, *supra* note 6, paras. 37-38, and 504(a).

²⁷ Hague Convention, art. 23(b). See IST Statute, art. 13(b)(12); ICC Statute, art. 8(b)(xi); FM 27-10, *supra* note 6, para. 31.

²⁸ Hague Convention, art. 23(c). See IST Statute, art. 13(b)(7); ICC Statute, art. 8(b)(vi); FM 27-10, *supra* note 6, para. 29.

²⁹ Hague Convention, art. 23(d). See IST Statute, art. 13(b)(13); ICC Statute, art. 8(b)(xii); FM 27-10, *supra* note 6, para. 28. Prior to the entry into force of the Hague Convention, under U.S. military law, the instruction by a commanding officer that he “wanted no prisoners” was found to constitute a violation of the general article (1874 ARTICLES OF WAR, art 62) as conduct prejudicial to good order and discipline. See S. DOC. NO. 57-213, at 2 (1903) (describing the court-martial of Brigadier General Jacob H. Smith, who was convicted of the offense and admonished).

³⁰ Hague Convention, art. 23(e). See ICTY Statute, art. 3(a); ICC Statute, art. 8(b)(xx); FM 27-10, *supra* note 6, para. 34. See also IST Statute, arts. 13(b)(19)-(20) and ICC Statute, arts. 8(b)(xviii)-(xix) (prohibiting the use of poisonous or asphyxiating gases and bullets which expand or flatten easily in the human body).

(G) destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;³²

(H) declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party;³³

(I) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;³⁴

(J) attacking or bombarding, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited—³⁵

(i) An undefended place, within the meaning this subsection, is any inhabited place near or in a zone where opposing armed forces are in contact which is open for occupation by an adverse party without resistance;

(ii) A place shall be considered undefended if all of the following criteria are met:

(a) Armed forces and all other combatants, as well as mobile weapons and mobile military equipment, must have been evacuated, or otherwise neutralized;

³¹ Hague Convention, art. 23(f). See IST Statute, art. 13(b)(8); ICC Statute, art. 8(b)(vii); FM 27-10, *supra* note 6, paras. 467 and 504(e)-(g). Both the IST and the ICC Statute added the language "resulting in death or serious personal injury" to the articles cited here.

³² Hague Convention, art. 23(g). See IST Statute, art. 13(b)(14); ICC Statute, art. 8(b)(xiii); FM 27-10, *supra* note 6, paras. 58-59 and 406-10. See also ICTY Statute, art. 3(b) and 3(d).

³³ Hague Convention, art. 23(h). See IST Statute, art. 13(b)(15); ICC Statute, art. 8(b)(xiv); FM 27-10, *supra* note 6, paras. 372-73.

³⁴ Hague Convention, art. 23(2). See IST Statute, art. 13(b)(16); ICC Statute, art. 8(b)(xv); FM 27-10, *supra* note 6, paras. 32 and 504(m).

³⁵ Hague Convention, art. 25. See IST Statute, art. 13(b)(6); ICTY Statute, art. 3(c); ICC Statute, art. 8(2)(b)(v); FM 27-10, *supra* note 6, paras. 39-40 and 504(d).

(b) no hostile use shall be made of fixed military installations or establishments;

(c) no acts of warfare shall be committed by the authorities or by the population; and

(d) no activities in support of military operations shall be undertaken.

(iii) The presence, in the place, of medical units, wounded and sick, and police forces retained for the sole purpose of maintaining law and order does not change the character of such an undefended place.³⁶

(K) Intentionally directing attacks against buildings that are dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.³⁷

(3) that is prohibited under Article 3 of any of the four international conventions signed at Geneva, 12 August 1949,³⁸ committed during an armed conflict not of an international character occurring in the territory of one of the parties to the Geneva

³⁶ FM 27-10, *supra* note 6, para. 39. Note that the language in paragraph 39 of the Field Manual was added as part of the 1976 change.

³⁷ Hague Convention, art. 27. See IST Statute, art. 13(b)(10); ICC Statute, art. 8(b)(2)(ix); FM 27-10, *supra* note 6, para. 57. See also ICTY Statute, art. 3(d). The text of Article 27 of the 1907 Hague Convention requires parties to take "all necessary steps" to spare "as far as possible" the structures listed. The proposed language in this draft reflects language of modern customary law. See Henckaerts, *supra* note 6, at 19.

³⁸ The text of the War Crimes Act automatically incorporated any protocol the Geneva Conventions to which the United States is a party and which deals with a conflict of a non-international character, likely in anticipation of eventual ratification of Additional Protocol II to the Geneva Conventions, which was sent to the Senate by President Reagan in 1987. 18 U.S.C. § 2441(c)(3) (2005); President's Message to the Senate Transmitting the Protocol (Geneva Conventions Protocol II), 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987). As House Report 204 noted, Additional Protocol I (Relating to the Protection of Victims of International Armed Conflicts) and Additional Protocol II (Relating to the Protection of Victims of Non-International Armed Conflicts) were opened for signature in 1977, but neither protocol has been ratified by the United States. H.R. REP. NO. 105-204, at 3 n.4 (1997). Instead of referencing the non-ratified protocols, proposed UCMJ legislation could incorporate certain provisions from those protocols which constitute serious violations of the laws and customs applicable to international and internal armed conflict, and which the United States has either expressly or implicitly acknowledged comprise international law. See *infra* note 54.

Conventions and against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, including, but not limited to:

(A) Violence to life and person, in particular—

(i) murder of all kinds,³⁹ as described by sections 918 and 919(a) of this title;⁴⁰

(ii) mutilation,⁴¹ including acts described in section 924 of this title;⁴²

(iii) torture,⁴³ as defined by 18 U.S.C. sec. 2340A,⁴⁴ or cruel treatment,⁴⁵

including conduct of a nature described in section 893, 920(a), 925, or 928 of this title,⁴⁶ and acts defined under section 934 of this title promulgated under an Executive Order,⁴⁷

including specifically offenses described as indecent acts with another, indecent assault, reckless endangerment, and assault with intent to commit murder, rape, or voluntary manslaughter;⁴⁸

³⁹ Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(1); ICTR Statute, art. 4(a); ICC Statute, art. 8(c)(i); FM 27-10, *supra* note 6, para. 11.

⁴⁰ See *supra* note 9.

⁴¹ Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(1); ICTR Statute, art. 4(a); ICC Statute, art. 8(c)(i); FM 27-10, *supra* note 6, para. 11.

⁴² Article 124 of the UCMJ states:

“Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—

(1) seriously disfigures his person by any mutilation thereof;

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical viro by the injury of any member or organ;

is guilty of maiming

10 U.S.C. § 924 (2005). See *supra* notes 9 and 22 for a brief discussion on the treatment of the existing UCMJ offense as a lesser included offense of a new UCMJ war crimes offense.

⁴³ Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(1); ICTR Statute, art. 4(a); ICC Statute, art. 8(c)(i); FM 27-10, *supra* note 6, para. 11.

⁴⁴ See *supra* note 11.

⁴⁵ Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(1); ICTR Statute, art. 4(a); ICC Statute, art. 8(c)(i); FM 27-10, *supra* note 6, para. 11.

⁴⁶ See *supra* note 13.

⁴⁷ See *supra* note 14.

⁴⁸ See *supra* note 15.

(B) Committing outrages upon personal dignity, in particular humiliating and degrading treatment,⁴⁹ including conduct of a nature described in section 893, 920(a), 925, or 928 of this title,⁵⁰ and offenses defined under section 934 of this title promulgated under an Executive Order, including offenses described as indecent acts with another and indecent assault;⁵¹

(C) Taking of hostages;⁵²

(D) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court that affords all judicial guarantees which are generally recognized as indispensable.⁵³

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996) willfully kills or causes serious injury to civilians.⁵⁴

⁴⁹ Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(2); ICTR Statute, art. 4(e); ICC Statute, art. 8(c)(ii); FM 27-10, *supra* note 6, para. 11; see also ICTY Statute, art. 5(i) (other inhumane acts can constitute a crime against humanity).

⁵⁰ See *supra* note 13.

⁵¹ See *supra* note 15.

⁵² Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(3); ICTR Statute, art. 4(c); ICC Statute, art. 8(c)(iii); FM 27-10, *supra* note 6, para. 11.

⁵³ Geneva Conventions I, II, III, and IV, art. 3. See IST Statute, art. 13(c)(4); ICTR Statute, art. 4(g); ICC Statute, art. 8(c)(iv); FM 27-10, *supra* note 6, para. 11.

⁵⁴ The text of 18 U.S.C. sec. (c)(4) included language that would automatically incorporate Protocol II of this Convention as amended "when the United States is a party to such Protocol . . ." Protocol II entered into force for the United States on November 24, 1999. Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996, S. TREATY DOC. NO. 105-1(A) (1999).

This proposed UCMJ Article contains only those violations specifically referenced directly and by implication in the federal criminal statute. 18 U.S.C. § 2441(c) (2005). Although the United States has not ratified Protocols I and II Additional to the Geneva Conventions, it has acknowledged that certain articles contained in those protocols reflect customary international law. See generally President's Message to the Senate Transmitting the Protocol (Geneva Conventions Protocol II), 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987) (transmitting Protocol II); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L & POL'Y, 419 (1987). As one witness stated during the hearings on the War Crimes Act, the list of war crimes in the federal legislation "is not an exclusive list of the possible crimes that the United States can address through

legislation” but rather serves as a starting point for further development. *War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims*, 104th Cong. 29 (1996) (statement of Monroe Leigh, Former Assistant General Counsel for International Affairs, Department of Defense, and Chairman, American Bar Association Task Force on War Crimes in Yugoslavia).

These other customary laws of war recognized by the United States and not specifically referenced in the War Crimes Act should be considered for codification in the new UCMJ Article 102. See FM 27-10, *supra* note 6; U.S. DEP’T OF ARMY, OPERATIONAL LAW HANDBOOK 11-67 (2004); U.S. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INST. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4 (Mar. 25, 2002), *citing* U.S. DEP’T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 4.1 (Dec. 9, 1998); *War Crimes Act of 1995: Hearing on H.R. 2587 before the House Subcomm. on Immigration and Claims*, *supra*, at 10 (recommendation to add to the War Crimes Act “a more general category of war crimes” to include rules governing civil wars and other internal armed conflicts, testimony of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State).

These provisions could be listed as subsections (b)(5) and (b)(6) of the proposed draft:

(5) that constitutes other serious violations of the laws and customs applicable in international armed conflict, namely, any of the following acts:

(A) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(B) Intentionally directing attacks against civilians objects, that is, objects which are not military objectives;

(C) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations or in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(D) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(E) Intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(F) the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(G) subjecting persons of another nation to physical mutilation, including acts described in section 924 of this title, or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(H) committing outrages upon personal dignity, in particular humiliating and degrading treatment, including conduct of a nature described in section 893, 920(a), 925, or 928 of this title, and offenses defined under section 934 of this title promulgated under an Executive Order, including offenses described as indecent acts with another and indecent assault;

(I) committing rape, as described by section 920(a) of this title, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;

(J) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(K) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(L) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under international law; and

(M) using children under the age of fifteen years to participate actively in hostilities.

(6) that constitutes serious violations of the laws and customs applicable in armed conflict not of an international character, namely, any of the following acts:

(c) “Persons protected under the convention” shall include a child in utero of any woman protected by the conventions and conduct under subsection (b)(1) that causes the death or bodily injury to a child in utero shall be liable for a separate offense under this subsection;⁵⁵

(d)(1) No person may be sentenced by court-martial to suffer death for an offense under this article, unless the members of the court-martial unanimously find that—⁵⁶

(A) in the case of the death of the victim—

(A) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(B) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(C) Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in humanitarian assistance missions, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(D) Intentionally directing attacks against buildings that are dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(E) Committing rape, as described by section 920(a) of this title, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity;

(F) Using children under the age of fifteen years to participate actively in hostilities;

(G) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; and

(H) Subjecting persons who are in the power of another party to the conflict to physical mutilation, including acts described in section 924 of this title, or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.

These provisions are based on the subparagraphs of Articles 13(b) and 13(c) of the IST Statute that are not already codified as part of subsection (b)(2) of the proposed UCMJ Article (violations of 1907 Hague Convention). *See* IST Statute, art. 13(b)(1)-(5), (8)(9), (11), (21)-(26) and art. 13(c)(1)-(4), (6)-(8), (11). *See also* Additional Protocol I, arts. 11(2), 12, 35(3), 37(1), 51(1)-(2), (5) and (7), 52(2), 54(1)-(2), 70(1), 75(1), 77(2), 85(4)(a); Additional Protocol II, arts. 4(1), 4(2)(a) and (e)-(g), 4(3)(e), 11(1), 13(2), 16, 17, and 18(2); ICC Statute, art. 8(b)(i)-(iv), (vii)-(x), (xxi)-(xxvi); *Antonio Cassese, Crimes Against Humanity*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 374-75 (Antonio Cassese et al. eds., 2002) (noting the recognition of sexual slavery as violative of customary law); Matheson, *supra*. One issue that still appears to be emerging is the treatment of the natural environment during armed conflict. Compare Matheson, *supra*, at 424 (objecting to Article 35(3) of Additional Protocol I as too broad and ambiguous) with OPERATIONAL LAW HANDBOOK, *supra*, at 195 (describing a less vague interpretation of “long-term,” “severe,” and “widespread” in relation to environmental damage).

⁵⁵ This language incorporates the language implemented in Article 119a. 10 U.S.C. § 919a (2005).

⁵⁶ This provision is modeled after the text of Article 106a. MCM, *supra* note 3, pt. IV, ¶30a.a(b). This recommended language takes into consideration the comparative severity of offenses committed under the proposed Article and applies the safeguards built into Article 106a.

(i) the death of the victim resulted, directly or indirectly, from an act or omission of the accused, as described in this subsection (b);

(ii) the killing was unlawful; and

(iii) at the time of the killing, the accused had a premeditated design to kill or was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, torture, or aggravated arson.⁵⁷

(B) in all qualifying cases, any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances.

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

⁵⁷ This proposed language is narrower than that of the federal statute. The War Crimes Act authorizes capital punishment “if death results to the victim” because of a war crime. 18 U.S.C. § 2441(a). Without further clarification, using such broad language could lead to the imposition of the death penalty for manslaughter or negligent homicide that occurs in the context of a qualifying armed conflict. The proposed language in this subsection reserves capital punishment only for the most serious war crimes—those involving premeditated murder, felony murder, and rape. The UCMJ authorizes the death penalty for rape, MCM, *supra* note 3, pt. IV, ¶45.a(a), premeditated murder, and felony murder, MCM, *supra* note 3, pt. IV, ¶43.a(1) and (4). The offense of torture is added to the felony murder provision in this proposed article to 1) reflect the existence of the federal criminal offense of torture and 2) place it in the context of an armed conflict. 18 U.S.C. § 2340A. The federal crime of torture under 18 U.S.C. sec. 2340A can occur only outside of the United States, and adding torture to a UCMJ felony murder rule that applies *solely* to war crimes does not unreasonably expand criminal liability.

If capital punishment for the war crimes of rape and the offenses described in this subsection is *not* authorized, then these newly defined UCMJ war crimes would be less severe than common crimes. If capital punishment is authorized for a *greater* range of war crimes than what currently exists in the UCMJ, it could encourage the perpetuation of the status quo, because military authorities may deliberately charge war crimes as common crimes in order to avoid proceedings involving the death penalty. A balance is best achieved by aligning the federal statute in a manner most consistent with existing UCMJ provisions.

b. *Elements*. [Under Article 36, Congress has delegated to the President the authority to prescribe modes of proof. The sections found in Part IV of the Manual for Courts-Martial that describe the elements of the offenses, provide further explanation and definitions, enumerate lesser included offenses, set the maximum punishment, and provide a sample specification are promulgated by Executive Order.⁵⁸ To the extent that existing UCMJ articles are referenced in this proposed Article, elements of those offenses should be incorporated.]

c. *Explanation*. [Explanations, as contained in the Manual for Courts-Martial, include descriptions of the nature of the offense, examples of conduct constituting or not constituting an offense, differences among subcategories of offenses, discussion of the required mens rea, defenses, and other relevant information.]⁵⁹

d. *Lesser included offenses*. [The general nature of war crimes generally places their severity above common crimes. If the offenses described in paragraph b of the draft article reference offenses contained in the punitive articles, then those punitive articles should be listed as lesser included offenses. For example, the war crime of premeditated murder described in subsections (b)(1)(A)(i) and (b)(3)(A)(i) could include the lesser *war crimes* of unpremeditated murder and voluntary manslaughter as well as the lesser *common offenses* listed in the Manual for Courts-Martial: unpremeditated murder, voluntary and involuntary manslaughter, assault (simple, aggravated, consummated by a battery, with intent to commit murder or voluntary manslaughter), and negligent homicide.⁶⁰ The lesser included offenses allow for a conviction of the underlying offense (common crime) if, for example, proof is

⁵⁸ For a recent example of the exercise of such presidential authority, see Executive Order No. 13365, Dec. 3, 2004.

⁵⁹ See *supra* note 58 and accompanying text.

⁶⁰ MCM, *supra* note 3, pt. IV, ¶43.d.

lacking to support the element that the person is protected under one of the Geneva Conventions. Double jeopardy may bar trial in U.S. federal courts following a conviction on an offense or lesser included offense under this proposed article.]⁶¹

e. *Maximum punishments.*⁶²

(1) *Premeditated murder and felony murder of a person protected by the Geneva Conventions.* Death; Mandatory minimum—imprisonment for life with eligibility for parole.⁶³

(2) *Rape of a person protected by the Geneva Conventions.* Death or such other punishment as a court-martial may direct.⁶⁴

(3) *All other offenses.* Any punishment, other than death, that a court-martial may direct.⁶⁵

f. *Sample specifications.* [Usually sample specifications are provided for each separately listed offense. For example, Article 99 (misbehavior before the enemy) describes nine

⁶¹ See *supra* note 58 and accompanying text.

⁶² Under Article 56, Congress has delegated to the President the authority place limits on maximum punishments for offenses under the UCMJ.

⁶³ This recommendation is based on the maximum punishment authorized for premeditated murder under Article 118(1) or (4) as well as the federal anti-torture statute. MCM, *supra* note 3, pt. IV, ¶43.e(1); 18 U.S.C. § 2340A(a) (2005).

⁶⁴ This recommendation is based on the maximum punishment authorized for rape under Article 120(1). MCM, *supra* note 3, pt. IV, ¶45.e(1). As long as the death penalty continues to be authorized for the common crime of rape under Article 120, the war crime constituting the same conduct should carry the same maximum punishment.

⁶⁵ This recommendation is based on the federal statute's maximum penalty of any term of years to life imprisonment for the commission of a war crime. 18 U.S.C. § 2441(a) (2005). Because Congress specifically named members of the U.S. armed forces as within the class of offenders covered by the War Crimes Act, the maximum punishment authorized under a new UCMJ article should closely follow the federal statute. 18 U.S.C. § 2441(b). In addition, existing UCMJ offenses related to war authorize comparable maximum punishment: misbehavior before the enemy (Article 99), subordinate compelling surrender (Article 100), improper use of a countersign (Article 101), forcing a safeguard (Article 102), looting and pillaging (Article 103), and misconduct as a prisoner (Article 105). Articles 99, 100, 101, and 102 also authorize the death penalty.

situations that would constitute violations of the article and provides nine corresponding sample specifications.^{66]}

⁶⁶ See *supra* note 58 and accompanying text.

APPENDIX 2

Potential War Crimes from the Current Conflicts

Over the past two years, the media have reported many incidents that could qualify for prosecution under the War Crimes Act, either under current law or if the UCMJ were amended. As of mid-March 2005, at least 26 detainees have died in U.S. custody in Iraq and Afghanistan in acts that Army and Navy officials suspect or allege to be criminal homicide.¹ Army criminal investigators have looked into more than 300 cases involving detainee maltreatment.² About twenty percent of those cases were death investigations.³

The information listed below contains summaries of open source reports of some of these investigations, courts-martial, and administrative actions involving U.S. military members deployed to Afghanistan and Iraq. The summaries include allegations of detainee abuse as well as other war-related crimes. This list is meant to be illustrative (but not exhaustive) of the types of crimes that occur in a deployed area of operations. These incidents, allegations, disciplinary actions, and courts-martial should serve as a starting point for discussing the range of war crimes and violations of international humanitarian law that should be fully integrated into the UCMJ.

Staff Sergeant (SSG) Jonathan J. Alban-Cardenas was charged with premeditated murder for his role in the killing of a wounded Iraqi teen on August 18, 2004.⁴ (See related entries for **Anderson** and **Horne**.) After consulting their platoon leader (Second Lieutenant Anderson), SSG Alban-Cardenas allegedly fired a burst of bullets, followed by SSG Horne.⁵ On January 14, 2005, SSG Alban-Cardenas was convicted of murder and conspiracy to

¹ Douglas Jehl & Eric Schmitt, *U.S. Military Says 26 Deaths May Be Homicide*, N.Y. TIMES, Mar. 16, 2005, at A1.

² *Id.*

³ *Id.*

⁴ Kate Zernike, *U.S. Soldier Found Guilty in Iraq Prison Abuse Case*, N.Y. TIMES, Jan. 15, 2005, at A5; Edmund Sanders, *The Conflict in Iraq: U.S. Soldier Pleads Guilty in 'Mercy' Killing of Iraqi*, L.A. TIMES, Dec. 11, 2004, at A13.

⁵ Sanders, *supra* note 4.

murder; he was sentenced to one year in confinement, reduction to E-1, and a bad-conduct discharge.⁶

Specialist (SPC) Megan Ambuhl pleaded guilty in October 2004 to a single charge of dereliction of duty through her willful failure to protect detainees from abuse while serving at Abu Ghraib prison.⁷ In exchange for her plea, the more serious charges of conspiracy, maltreatment of detainees, and indecent acts were dropped.⁸ Her sentence included a reduction to lowest enlisted rank (E-1) and forfeiture of pay;⁹ she also received a less than honorable discharge.¹⁰ (See related entries for **Cruz, Davis, England, Frederick, Graner, Harman, Krol, and Sivits.**)

Second Lieutenant (2LT) Erick Anderson was charged with premeditated murder for his role in the fatal shooting of a wounded Iraqi teen; 2LT Anderson was the platoon leader.¹¹ For details of the incident, see the entries for **Alban-Cardenas** and **Horne**. According to SSG Horne's testimony, he turned to 2LT Anderson for guidance on what to do with badly wounded teen "whose internal organs had been blown away."¹² After SSG Horne reportedly told 2LT Anderson, "I don't want to leave him like that," the lieutenant responded with "Do it," which SSG Horne understood to mean that he (SSG Horne) would shoot the teen.¹³ As of January 19, 2005, the charges against 2LT Anderson were dismissed without prejudice, but the officer may face additional allegations of misconduct.¹⁴

Corporal (CPL) Dustin Berg faced charges of murder, false swearing, and wearing of an unauthorized award.¹⁵ Army officials reported that on November 23, 2003, CPL Berg had allegedly shot himself and killed a civilian member of the Iraqi police with whom he had been on patrol.¹⁶ Corporal Berg received a Purple Heart for combat injuries that he may have sustained from that incident.¹⁷ Testimony at the preliminary hearing on February 10, 2005, suggested that CPL Berg shot himself in the abdomen with the Iraqi's weapon because he believed that his explanation of the incident would not be believed.¹⁸ Charges were referred in March 2005 to trial by court-martial and, if convicted of murder, CPL Berg faces the

⁶ Brian E. Albrecht, *Army Dismisses Murder Charges: Twinsburg Soldier Still Faces Probe*, PLAIN DEALER (Cleveland), Jan. 19, 2005, at A1; Brian Donnelly & Matt Spetalnick, *US Soldier Jailed One Year for Murder of Injured Iraqi*, HERALD (Glasgow), Jan. 15, 2005, at 1.

⁷ Douglas Jehl, *G.I. in Abu Ghraib Abuse Is Spared Time in Jail*, N.Y. TIMES, Nov. 3, 2004, at A4.

⁸ Josh White, *Abu Ghraib Prison MP Pleads Guilty to Reduced Charge*, WASH. POST, Nov. 3, 2004, at A12.

⁹ Jehl, *supra* note 7.

¹⁰ Sarah Baxter, *A Trail of Torture at Hands of U.S. Forces*, AUSTRALIAN, Jan. 17, 2005, at 14. It is unclear whether SPC Ambuhl's separation resulted from a punitive discharge adjudged by the court or an administrative discharge under other than honorable conditions.

¹¹ Sanders, *supra* note 4.

¹² *Id.*

¹³ *Id.*

¹⁴ Albrecht, *supra* note 6.

¹⁵ Jon Murray, *Hoosier Faces Trial in Killing of Iraqi: Hearing Thursday Could Lead to Court-Martial for Guardsman Accused in Death of Citizen*, INDIANAPOLIS STAR, Feb. 9, 2005, at 1A.

¹⁶ Michael Lindenberger, *Guardsman Is Charged with Murder, Lying About Incident that Led to Award*, COURIER-J. (Louisville, KY), Feb. 9, 2005, at 3B.

¹⁷ *Id.*

¹⁸ Terry Horne, *Indiana Soldier to Be Tried in Death of Iraqi Policeman*, INDIANAPOLIS STAR, Mar. 5, 2005, at 8A.

possibility of life in prison without parole.¹⁹ A second pretrial hearing was held later in March to re-open the investigation relating to alleged false statements; the trial is expected to be scheduled for late July 2005.²⁰

Sergeant (SGT) James P. Boland was charged in August 2004 with assault, maltreatment of a detainee, and dereliction of duty for alleged conduct in connection with treatment of a detainee on December 10, 2002, at Bagram, Afghanistan.²¹ He was charged with a second specification of dereliction of duty in the death of another detainee on December 3, 2002.²² (See related entries for **Brand**, **Cammack**, and **Morden**.)

Private First Class (PFC) Willie Brand faced a preliminary hearing in late March 2005 before charges related to the death of a detainee at Bagram, Afghanistan, were referred to trial by court-martial.²³ The detainee's body was found on December 10, 2002, in a cell used for interrogations.²⁴ The charges against PFC Brand included involuntary manslaughter, aggravated assault, simple assault, maiming, maltreatment, and making a false sworn statement.²⁵ In May, defense attorneys for PFC Brand asked a military judge to reopen the investigation to interview witnesses at the detention facility; a ruling on the request is not expected until June 2005.²⁶ (See related entries for **Boland**, **Cammack**, and **Morden**.)

Specialist James Caldwell was implicated the theft of money from an Iraqi bank he was guarding in August 2003.²⁷ He and another soldier conspired to cover up the crime.²⁸ (See related entries for **Gentry**, **Knight**, and **Zamora**.)

Specialist Brian E. Cammack was charged with assault and other crimes related to the abuse and death of two detainees at Bagram, Afghanistan.²⁹ On May 20, 2005, SPC Cammack pleaded guilty to assault and two specifications of making a false official statement and agreed to testify in related cases in exchange for a dismissal of the charge of maltreating detainees.³⁰ He was sentenced to three months of confinement, reduction to E-1, and a bad-conduct discharge.³¹ (See related entries for **Boland** and **Morden**.)

¹⁹ *Id.*

²⁰ John Murray, *Soldier Faces Hearing on Charges of Lying: Army to Address Lesser Charge Against Hoosier Accused of Murdering Iraqi*, INDIANAPOLIS STAR, Mar. 18, 2005, at B8.

²¹ *Nation in Brief*, WASH. POST, Mar. 8, 2005, at A16.

²² *Id.*

²³ Douglas Jehl, *Army Details Scale of Abuse in Afghan Jail*, N.Y. TIMES, Mar. 12, 2005, at A1.

²⁴ *Nation in Brief*, *supra* note 21.

²⁵ *Id.* Compare these and other allegations of U.S. soldiers beating detainees with the finding of guilt for the crime of administering cruel treatment for administering several beatings to detainees in *Prosecutor v. Jelesic*, Case No. IT-95-10, Judgment (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 14, 1999).

²⁶ *Around the Nation*, HOUSTON CHRON., May 8, 2005, at A12.

²⁷ Jessica Inigo, *1st ID GI Gets Jail Time for Stealing Nearly \$68,000 from Iraqi Bank*, STARS & STRIPES, July 14, 2004, available at <http://www.estripes.com> (last visited May 12, 2005).

²⁸ *Id.*

²⁹ Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1. Specialist Cammack is likely charged with connection with the death of one of the Afghan detainees at Bagram. See *id.*

³⁰ *The Nation in Brief: Soldier Gets Jail Time in Prisoner's Death*, L.A. TIMES, May 23, 2005, at A11.

³¹ *Id.*

Specialist Timothy Canjar was accused of dereliction of duty, maltreatment of detainees, and making a false official statement for intentionally and violently twisting a detainee's injured arm and for his role in holding a detainee's legs apart while fellow soldier encouraged others to kick the detainee in the groin.³² Specialist Canjar received nonjudicial punishment that included forfeiture of pay, reduction to E-1, 30 days of extra duty, and 30 days of restriction to the base; he was later separated from the Army with an honorable discharge.³³ (See related entries for **Edmondson**, **Girman**, and **McKenzie**.)

Specialist Joshua R. Claus has been charged with assault, maltreatment of a detainee, and making a false statement to investigators for his participation in interrogations that led to the death of an Afghan detainee at Bagram in December 2002.³⁴

Specialist Damien M. Corsetti remain under investigation for assault, maltreatment of detainees, and indecent acts related to abusive interrogation techniques used toward detainees at Bagram, Afghanistan.³⁵ While serving at Abu Ghraib, after SPC Corsetti allegedly forced an Iraqi woman to strip during questioning, he was fined and demoted.³⁶

Specialist Armin J. Cruz was accused of ordering three naked Abu Ghraib prisoners to crawl along a concrete floor, handcuffing them, and stepping on at least one prisoner.³⁷ After pleading guilty in September 2004 to conspiracy and maltreatment of prisoners, he was sentenced to eight months of confinement, reduction to E-1, and a bad-conduct discharge.³⁸ (See entries for **Ambuhl**, **Davis**, **England**, **Frederick**, **Graner**, **Harman**, **Krol**, and **Sivits**.)

Captain (CPT) Matthew Cunningham, when issuing orders about a house-to-house raid in December 2003, allegedly told his platoon leaders that certain named persons were to be killed if found.³⁹ Captain Cunningham received nonjudicial punishment in 2004 for his role in covering up a January 2004 incident involving the drowning of an Iraqi man,⁴⁰ but a criminal investigation was continuing as of March 16, 2005.⁴¹ (See related entries for **Perkins**, **Gwinner**, **Sassaman**, and **Saville**.)

Specialist Rami Dajani, a Palestinian who enlisted in the Army after the 2001 terrorist attack in New York, was tried by court-martial in January 2005 for his role in the fatal shooting of an Iraqi translator who worked at a U.S. base.⁴² After three-way teasing about

³² *Troops Discharged for Beating Iraqis*, AUSTRALIAN, Jan. 7, 2004, at 6.

³³ *Id.* The newspaper account does not specify whether the discharge was honorable or under honorable conditions; the latter is often referred to as a general discharge.

³⁴ Golden, *supra* note 29.

³⁵ *Id.* ³⁶ Golden, *supra* note 29.

³⁷ Norimitsu Onishi, *Military Specialist Pleads Guilty to Abuse and Is Jailed*, N.Y. TIMES, Sept. 12, 2004, at A1.

³⁸ *Id.*

³⁹ John W. Gonzalez, *Officer Gets Confinement in River Incidents: He Expresses Remorse for His Role in Forcing Three Detainees into the Tigris*, HOUSTON CHRON., Mar. 16, 2005, at A13 (citing testimony from 1LT Jack Saville).

⁴⁰ *Army Punishes Commanders in Drowning of Iraqi Civilian*, ORLANDO SENTINEL, July 8, 2004, at A5.

⁴¹ Gonzalez, *supra* note 39.

⁴² Doug Struck, *Two Soldiers Sentenced in Interpreter's Death*, WASH. POST, Jan. 23, 2005, at A20; Edward Wong & Christine Hauser, *Two G.I.'s Guilty in Iraq Co-Workers Death*, N.Y. TIMES, Jan. 23, 2005, at A14.

shooting someone, SPC Dajani handed SPC Charley Hooser a handgun without checking to see if it was loaded; SPC Hooser pointed the gun at the woman's head and fired.⁴³ For two weeks following the shooting, SPCs Dajani and Hooser told investigators that the translator shot herself.⁴⁴ Prosecutors dropped a charge of involuntary manslaughter, and SPC Dajani pleaded guilty of making a false official statement and being an accessory after the fact.⁴⁵ He received 18 months of confinement, reduction to E-1, and a bad-conduct discharge.⁴⁶

Sergeant Javal Davis pleaded guilty on February 1, 2005, to abusing detainees at Abu Ghraib prison by stomping on the fingers and toes of several naked, hooded, and handcuffed prisoners.⁴⁷ Under a plea agreement, SGT Davis pleaded guilty to dereliction of duty, assault consummated by a battery, and making false official statements in exchange for dropping charges of conspiracy and maltreating detainees and a confinement cap of 18 months.⁴⁸ A military jury sentenced him to six months of confinement and a bad-conduct discharge.⁴⁹ (See related entries for **Ambuhl, Cruz, England, Frederick, Graner, Harman, Krol, and Sivits.**)

Sergeant First Class (SFC) Jorge L. Diaz was arraigned in February 2005 on charges premeditated murder, maltreatment of a prisoner, assault, making a false official statement, impeding an investigation.⁵⁰ During a search operation in October 2004, SFC Diaz punched and choked a blindfolded Iraqi teenaged detainee, pointed a pistol at his head, and forced him to hold a smoke grenade with the pin pulled.⁵¹ The next day, SFC Diaz fatally shot an Iraqi who had his hands cuffed.⁵² He allegedly told a soldier to lie about the incident and falsely told an Army investigator that he fired at the Iraqi after the man had made a threatening move toward him.⁵³ At trial, after hearing testimony from SFC Diaz, the military judge found him guilty of unpremeditated murder.⁵⁴ He was also convicted of maltreating the Iraqi teen and impeding the investigation, but acquitted of the charge of making a false statement.⁵⁵ The military judge imposed a sentence that included a dishonorable discharge, reduction to the rank of E-1, and eight years of confinement, which was reduced to seven years through a plea agreement.⁵⁶

⁴³ Struck, *supra* note 42.

⁴⁴ Wong & Hauser, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ *Id.*; *The Conflict in Iraq: Soldier Guilty in Fatal Shooting*, L.A. TIMES, Jan. 23, 2005, at A10.

⁴⁷ John W. Gonzalez, *Abu Ghraib Soldier Gets Six-Month Prison Term: Sergeant Said He Abused Inmates for Ten Seconds*, HOUSTON CHRON., Feb. 5, 2005, at A21. A copy of the charge sheet is available at <http://news.findlaw.com/hdocs/docs/iraq/davis42804chrg.html> (last visited Feb. 19, 2005).

⁴⁸ Gonzalez, *supra* note 47; David Abel, *Reservist from Randolph Sentenced*, BOSTON GLOBE, Feb. 2, 2005, at A11.

⁴⁹ *Soldier Gets Six Months for Prisoner Abuse*, CHI. TRIB., Feb. 5, 2005, at 12.

⁵⁰ Steve Liewer, *1st ID Soldier Charged with Killing One Iraqi Prisoner, Mistreating Others*, STARS & STRIPES, Feb. 26, 2005, available at www.estripes.com (last visited May 12, 2005).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Steve Liewer, *1st ID Soldier Found Guilty in Shooting Death of Iraqi During Interrogation*, STARS & STRIPES, May 19, 2005, available at www.estripes.com (last visited May 19, 2005).

⁵⁵ *Id.*

⁵⁶ Steve Liewer, *1st ID Soldier Gets Seven Years in Killing of Iraqi Detainee During Interrogation*, STARS & STRIPES, May 20, 2005, available at www.estripes.com (last visited May 20, 2005).

Sergeant Shawna Edmondson was discharged under other than honorable conditions instead of facing of trial by court-martial in November 2003.⁵⁷ She apparently faced charges for participating in detainee abuse in Iraq.⁵⁸ (See entries for **Canjar**, **Girman**, and **McKenzie**.)

Private First Class Lynndie England faces trial by court-martial for charges for her conduct toward prisoners at Abu Ghraib in Iraq. The original charges included indecent acts with soldiers and detainees, assault of detainees, conspiracy to commit maltreatment of a detainee, conduct prejudicial to good order and discipline for posing in photographs with detainees, and violation of an order restricting contact with SPC Graner.⁵⁹ The original charges, which carried a maximum confinement penalty of nearly 30 years, were dropped to allow the trial to be moved from North Carolina to Texas.⁶⁰ New charges carried a maximum penalty of 16½ years and included two specifications each of conspiracy and indecent acts, four specifications of cruelty and maltreatment of detainees, and one charge of dereliction of duty.⁶¹ At trial, a day after entering a guilty plea under a pretrial agreement and after former SPC Graner testified that the conduct in the photographs was not abuse, the military judge rejected PFC England's guilty plea and declared a mistrial.⁶² (See related entries for **Ambuhl**, **Cruz**, **Davis**, **Frederick**, **Graner**, **Harman**, **Krol**, and **Sivits**.)

Staff Sergeant Ivan "Chip" Frederick, Jr. pleaded guilty in October 2004 to conspiracy, dereliction of duty, maltreatment of Abu Ghraib detainees, assaulting a detainee, and indecent acts.⁶³ The charges stemmed from incidents that included punching a prisoner, ordering a prisoner to masturbate in front of others, and placing wires on a prisoner's finger to threaten electrocution if the prisoner fell off of a box.⁶⁴ He was sentenced to confinement for ten years (reduced to eight years under a plea agreement), reduction to E-1, forfeiture of pay, and a dishonorable discharge.⁶⁵ (See related entries for **Ambuhl**, **Cruz**, **Davis**, **England**, **Graner**, **Harman**, **Krol**, and **Sivits**.)

Major (MAJ) Michael Froeder, a Marine reservist, was charged with dereliction of duty in relation to a prisoner's death in Iraq in June of 2003.⁶⁶ More than two months after the preliminary hearing, the commanding general dismissed the charges with prejudice in October 2004.⁶⁷ (See related entries for **Hernandez**, **Mikholap**, **Paulus**, **Pittman**, **Rodney**, **Rodriguez-Martinez**, **Roy**, and **Vickers**.)

⁵⁷ *Troops Discharged for Beating Iraqis*, *supra* note 32.

⁵⁸ *Id.*

⁵⁹ *Status of the Charges*, PITT. POST-GAZETTE, Dec. 21, 2004, at A8.

⁶⁰ Josh White, *Military Files New Charges in Scandal: Pfc. England Faces Less Prison Time*, WASH. POST, Feb. 18, 2005, at A25.

⁶¹ *Id.*

⁶² Geoff Elliott, *Mistrial as Judge Rejects England's Plea*, AUSTRALIAN, May 6, 2005, at 9.

⁶³ Monte Morin, *The World: G.I. Gets Eight-Year Sentence After Guilty Plea in Abuse Scandal*, L.A. TIMES, Oct. 22, 2004, at A4. A copy of the charge sheet is available at <http://news.findlaw.com/hdocs/docs/iraq/ifred32004chrg.html> (last visited May 12, 2005).

⁶⁴ Morin, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ Jeff McDonald, *Beatings Used to Show Who Was in Charge, Witness Says: Marine's Court-Martial in Iraqi's Death Goes On*, SAN DIEGO UNION-TRIB., Aug. 31, 2004, at B1.

⁶⁷ *Iraq Digest*, SEATTLE TIMES, Oct. 22, 2004, at A18.

Private First Class Joshua R. Gabbey was among a group of four Marines who subjected an Iraqi prisoner to electric shocks in April 2004.⁶⁸ In a court-martial scheduled for July 2004, PFC Gabbey faced charges of cruelty and maltreatment, dereliction of duty and conspiracy to commit assault, making a false statement and disobeying an order.⁶⁹ (See related entries for **Sting**, **Trefney**, and **Travis**.)

Specialist Donald E. Gentry convicted in July 2004 at a general court-martial of larceny, conspiracy, obstruction of justice, and making false statements.⁷⁰ The charges stemmed from an incident in which SPC Gentry stole more than \$67,000 from an Iraqi bank in Kirkuk while on guard duty on August 18, 2003.⁷¹ After noticing that a bank teller left a drawer of cash unsecured, four soldiers initially talked about taking the money but abandoned the drawer and idea.⁷² Later that night, after SPC Gentry went back to the drawer, each of the other three soldiers took \$300 and SPC Gentry kept the rest of the money.⁷³ He and another soldier (Caldwell) tried to conceal the crime by attempting to destroy and dispose of the container that held the money.⁷⁴ SPC Gentry was sentenced to two years of confinement, reduction to E-1, forfeiture of all pay, and a bad-conduct discharge.⁷⁵ (See related entries for **Caldwell**, **Knight**, and **Zamora**.)

Master Sergeant Lisa Girman was found guilty maltreatment of detainees and dereliction of duty through nonjudicial punishment proceedings for urging her subordinates to hold down and beat a detainee and for repeatedly kicking another detainee in the groin, abdomen and head.⁷⁶ She was reduced to the rank of E-1 and separated administratively with a discharge under other than honorable conditions.⁷⁷ (See related entries for **Canjar**, **Edmondson**, and **McKenzie**.)

Specialist Charles Graner's court-martial in January 2005 was one of the most publicized trials of the Iraqi conflict and the first fully litigated court-martial from of the Abu Ghraib

⁶⁸ Sewell Chan, *Marine Sergeant to Face Court-Martial in Abuse: Four Charged in Case of Iraqi Prisoner Receiving Electric Shocks at Makeshift Detention Facility*, WASH. POST, June 12, 2004, at A18. Compare these allegations and related cases with the finding of guilt of inhumane treatment for administering electric shocks in *Prosecutor v. Mucic et al.*, Case No. IT-96-21-T, Sentencing Judgment, para. 29 (Int'l Crim. Trib. Yugoslavia, Trial Chamber, Oct. 9, 2001).

⁶⁹ James W. Crawley, *Two Marines Face Courts-Martial in Assault of Prisoner at Iraq Jail*, SAN DIEGO UNION-TRIB., June 5, 2004, at A15. PFC Gabbey may have received substantially less time in confinement. See Gail Gibson, *Marines Abused Detainees in Iraq, Documents Show: Penalties Mostly Lighter than in Abu Ghraib Case*, BALTIMORE SUN, Dec. 15, 2004, at 1A (noting that three Marines accused of administering electrical shocks to an Iraqi detainee in April 2004 received sentences to confinement from 60 days to one year).

⁷⁰ Inigo, *supra* note 27. Specialist Gentry could have been charged with the crime of looting under Article 103(b)(3). See *U.S. v. Manginell*, 32 M.J. 891 (A.F.C.M.R. 1991). Looting is already defined as a war crime under the War Crimes Act through reference to Article 28 of the Hague Convention. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 28, 36 Stat. 2277, 2309.

⁷¹ Inigo, *supra* note 27.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Troops Discharged for Beating Iraqis*, *supra* note 32.

⁷⁷ *Id.*

trials. The charge sheet showed that he was accused of conduct that took place in October and November 2003 and violated the following UCMJ articles:⁷⁸

- Article 81 (two specifications): conspiracy to maltreat detainees resulting in the 1) photograph of PFC **England** leading a detainee by a leash and 2) photograph of the pyramid of naked detainees.
- Article 92: willful dereliction of duty for failing to protect detainees from abuse.
- Article 93 (four specifications): maltreatment of subordinates for 1) making naked detainees form a human pyramid and being photographed with them, 2) ordering detainees to strip and perform sexual acts in front of other soldiers and detainees, 3) being photographed with an armed raised as if ready to strike a detainee in the head or neck, and 4) encouraging PFC **England** to drag a detainee by a leash and photographing the incident.
- Article 128 (four specifications): assault consummated by a battery for 1) jumping on a pile of detainees and 2) stomping on detainee's hands and feet; aggravated assault for 3) punching a detainee with enough force to knock him unconscious and 4) hitting a detainee on existing injuries with an expandable metal baton. The first two specifications of simple battery were dropped.⁷⁹
- Article 134 (three specifications): 1) adultery, 2) indecent acts for watching detainees attempt to masturbate, and 3) obstruction of justice for influencing a witness. The adultery and obstruction specifications were dropped before the case went to the panel during the findings phase.

On January 14, 2005, the court-martial panel found SPC Graner guilty of most of the remaining specifications⁸⁰ and sentenced him to ten years confinement, reduction to E-1, and a dishonorable discharge.⁸¹ (See related entries for **Ambuhl, Cruz, Davis, England, Frederick, Harman, Krol, and Sivits**.)

At **Guantanamo Bay** an unnamed Army specialist was charged with assaulting a detainee by attempting to spray the man with a hose.⁸² His punishment, apparently nonjudicial, consisted of a rank reduction to E-2, seven days of restriction to specified limits, and a reassignment to other duties on the base.⁸³ In an April 2003 nonjudicial punishment action, another Army specialist was charged with dereliction of duty and assault for striking a subdued detainee with a radio; the detainee, prior to being subdued, had assaulted and bit a guard. The specialist was reduced to the rank of private first class, given 45 days of extra duty, and reassigned to part of the base.⁸⁴ In a third case, an Army staff sergeant turned down an offer of nonjudicial punishment and demanded trial by court-martial for an allegation of using pepper spray on a detainee during a disturbance; the soldier was acquitted.⁸⁵

⁷⁸ The charge sheet is available at <http://news.findlaw.com/cnn/docs/iraq/graner51404chrg.html> (last visited May 12, 2005).

⁷⁹ Sig Christenson, *Fort Hood Jury Set to Hear Abu Ghraib Case*, SAN ANTONIO EXPRESS-NEWS, Jan. 8, 2005, at 6A.

⁸⁰ Baxter, *supra* note 10. SPC Graner was apparently acquitted of the conspiracy charges. *See id.*

⁸¹ T.A. Badger, *Soldier Gets Ten Years for Iraq Prison Abuse*, DETROIT NEWS, Jan. 16, 2005, at 1A.

⁸² *Two Guantanamo Guards Disciplined*, CNN, May 7, 2004, available at <http://www.cnn.com/2004/US/South/05/07/guantanamo.force/index.html> (last visited May 12, 2005).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

Major Robert Gwinner received nonjudicial punishment in 2004 for his role in impeding a homicide investigation⁸⁶ into the January 2004 drowning of an Iraqi man forced into the Tigris River by soldiers in his unit. (See related entries for **Cunningham, Perkins, Sassaman, and Saville**.)

Specialist Sabrina D. Harman, who was accused of taking the infamous picture of the human pyramid at Abu Ghraib prison,⁸⁷ was also charged with conspiracy to commit offenses against detainees, dereliction of duty for failure to protect detainees from abuse, cruelty and maltreatment of detainees, and indecent acts with Iraqi detainees.⁸⁸ Following her court-martial and conviction on most of the charges, SPC Harman faced a maximum confinement of 5 years; the military panel sentenced her to six months of confinement, reduction to the rank of private, and a bad-conduct discharge.⁸⁹ (See related entries for **Ambuhl, Cruz, Davis, England, Frederick, Graner, Krol, and Sivits**.)

Lance Corporal Christian Hernandez faced charges of negligent homicide and assault after a 52-year-old Ba'ath Party official died in June 2003 at Camp Whitehorse near Nasiriyah, Iraq.⁹⁰ Charges were dropped without comment in April 2004.⁹¹ (See related entries for **Froeder, Mikhola, Paulus, Pittman, Rodney, Rodriguez-Martinez, Roy, and Vickers**.)

Specialist Charley Hooser was convicted in January 2005 of involuntary manslaughter and making a false official statement after fatally shooting a U.S.-hired Iraqi translator in November 2004.⁹² After three-way teasing about "shooting someone," SPC Rami **Dajani** handed SPC Hooser a handgun from a cabinet in the room.⁹³ SPC Hooser, not knowing that the gun was loaded, pointed the pistol at the translator's head and fired.⁹⁴ His sentence included three years of confinement, forfeiture of pay, reduction to E-1, and a bad-conduct discharge.⁹⁵

Staff Sergeant Johnny Horne Jr. pleaded guilty to one charge of unpremeditated murder for shooting an unarmed, severely wounded 16-year-old Iraqi on August 18, 2004.⁹⁶ SSG Horne's unit fired on a dump truck carrying more than a dozen young men and teenagers hired as trash collectors; the unit believed that truck carried insurgents.⁹⁷ Although

⁸⁶ *Army Punishes Commanders in Drowning of Iraqi Civilian*, *supra* note 40.

⁸⁷ Suzanne Goldenberg, *US to Try 20 More Troops for Iraq Abuse*, GUARDIAN (London), Jan. 17, 2005, at 2.

⁸⁸ *Status of the Charges*, *supra* note 59.

⁸⁹ John W. Gonzalez, *Reservist Receives 129-Day Sentence in Iraq Abuse Case: She Also Gets a Bad-Conduct Discharge and Has Her Rank Reduced*, HOUSTON CHRON., Mar. 18, 2005, at A11.

⁹⁰ Rick Rogers, *Abuse Charges Against Marine Reservist Are Dismissed: He Was Accused in Death of Iraqi at Detention Center*, SAN DIEGO UNION-TRIB., Apr. 13, 2004, at B1.

⁹¹ *Id.*

⁹² Wong & Hauser, *supra* note 42.

⁹³ Struck, *supra* note 42.

⁹⁴ Wong & Hauser, *supra* note 42.

⁹⁵ Maki Becker, *Kidnapped Iraqi Troops Slain: 15 from Bus "Executed"*, N.Y. DAILY NEWS, Jan. 23, 2005, at 10; Wong & Hauser, *supra* note 42.

⁹⁶ Paul Garwood, *Soldier Jailed for Iraq Killing*, SUNDAY MAIL (Queensland), Dec. 12, 2004, at 48; Sanders, *supra* note 4. SSG Horne was originally charged with premeditated murder and conspiracy to commit murder. Garwood, *supra*.

⁹⁷ Sanders, *supra* note 4.

SSG Horne claimed that the killing was intended to end the teen's suffering, media interviews reported that witnesses to the shooting said that the wounds were not serious and the boy's life might have been saved.⁹⁸ A pretrial agreement capped the maximum amount of confinement at 10 years in exchange for the guilty plea; the court-martial panel sentenced SSG Horne to three years of confinement, reduction to E-1, forfeitures of pay, and a dishonorable discharge.⁹⁹ (See related entries for **Alban** and **Anderson**.)

Lieutenant Colonel (LTC) Steve L. Jordan, former director of the Joint Interrogation and Debriefing Center at Abu Ghraib, was reprimanded and relieved of his command for problems at Abu Ghraib prison in Iraq.¹⁰⁰ (See similar entries for **Karpinski**, **Pappas**, **Phillabaum**, and **Reese**.)

Brigadier General (BG) Janis Karpinski, commander of the 800th Military Police Brigade, was reprimanded and relieved of her command for problems at Abu Ghraib prison in Iraq.¹⁰¹ In May 2005, BG Karpinski was administratively demoted to the rank of colonel, however, the demotion action was only partly based on dereliction of duty and it is unclear whether the allegation related directly to the Abu Ghraib scandal.¹⁰² (See similar entries for **Jordan**, **Pappas**, **Phillabaum**, and **Reese**.)

Specialist Christopher Knight was implicated the theft of money from an Iraqi bank while on guard duty in August 2003.¹⁰³ (See entries for **Caldwell**, **Gentry**, and **Zamora**.)

Specialist Roman Krol admitted in February 2005 that he ignored his specialized training and abused a naked Abu Ghraib prisoner by pouring water on him; he also acknowledged ignoring the October 2003 abuses that later turned up in photographs.¹⁰⁴ After accepting SPC Krol's guilty plea, the military judge sentenced him to ten months of confinement and a bad-conduct discharge.¹⁰⁵ (See related entries for **Ambuhl**, **Cruz**, **Davis**, **England**, **Frederick**, **Graner**, **Harman**, and **Sivits**.)

Lieutenant Andrew K. Ledford, a Navy SEAL, faces charges of assault, maltreatment of an Iraqi detainee,¹⁰⁶ and lying to investigators.¹⁰⁷ The lieutenant is specifically accused of punching the detainee, who was delivered to CIA interrogators at Abu Ghraib prison in Iraq and who was later found dead, in the arm and posing for a photograph with him.¹⁰⁸ Lieutenant Ledford is one of at least ten members of the platoon who were investigated for

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ John W. Gonzalez, *Prosecutions Wind Down at Fort Hood: No One Ranked Higher than Staff Sergeant Faces Charges in the Abu Ghraib Case*, HOUSTON CHRON., Apr. 4, 2005, at B1.

¹⁰¹ *Id.*

¹⁰² Josh White, *General Demoted, But Cleared in Abuse Probe*, WASH. POST, May 6, 2005, at A8.

¹⁰³ Inigo, *supra* note 27.

¹⁰⁴ John W. Gonzalez, *Two Soldiers Plead Guilty to Abuses at Abu Ghraib: One Receives Ten Months in Jail and Is Discharged, the Other will Seek a Light Sentence*, HOUSTON CHRON., Feb. 2, 2005, at A13.

¹⁰⁵ *Id.*

¹⁰⁶ Ned Parker, *Iraqi P.M. Defiant Amid New Bloodshed*, ADVERTISER (Queensland), Jan. 12, 2005, at 31.

¹⁰⁷ T.R. Reid, *Trial Starts in Abu Ghraib Death: Navy SEAL Faces Charges, CIA Agents Not Named in Case*, WASH. POST, May 25, 2005, at A2.

¹⁰⁸ *Id.*

unlawful treatment of detainees.¹⁰⁹ A conviction on all charges could garner a maximum sentence of eleven years of confinement.¹¹⁰ (See related entry for Navy SEALs.)

Specialist Jerry Loper was charged with murder and dereliction of duty relating to the suffocation of an Iraqi general during an interrogation in November 2003.¹¹¹ On December 2, 2004, closed pretrial hearings began to determine whether SPC Loper will face trial by court-martial.¹¹² (See also entries for **Sommer**, **Welshofer**, **Voss**, and **Williams** [Jefferson]).

U.S. Marines were prosecuted for incidents of detainee abuse dating back to the summer of 2003. Three Marines received sentences ranging from thirty days of hard labor without confinement to 14 days of confinement for offenses that included spraying suspected looters with a fire extinguisher and ordering Iraqi juveniles to kneel and then discharging a pistol in the air as a “mock execution.”¹¹³ Another Marine was convicted of assault for throwing a lighted match at a detainee as the detainee used an alcohol-based hand sanitizer; the Iraqi suffered second-degree burns on his hands and the Marine was sentenced to confinement for 90 days.¹¹⁴

Specialist Juba Martino-Poole fatally shot an Iraqi prisoner in 2003; he was administratively discharged in lieu of trial by court-martial.¹¹⁵

Captain Shawn L. Martin faced eight counts of assault and one count each of obstruction of justice and conduct unbecoming an officer for his treatment of Iraqi civilians during patrols from May to July 2003.¹¹⁶ Captain Martin allegedly screamed at and kicked civilian detainees, ordered at gunpoint an enlisted soldier to fire over the head of a detainee, ordered another enlisted soldier to beat up a detainee, and fired his pistol at the feet of a suspect during an interrogation.¹¹⁷ Facing a maximum of 44 years in prison if found guilty on all counts,¹¹⁸ CPT Martin was acquitted of all but three assault charges and was sentenced to 45 days in confinement, forfeitures of pay totaling \$12,000, and a reprimand.¹¹⁹

¹⁰⁹ *Id.* According to the report, nine platoon members received nonjudicial punishment for their involvement.

¹¹⁰ *Id.* At the time of this print, trial proceedings were still ongoing.

¹¹¹ *January 30 Election Won't Be Delayed, Bush Says*, ST. PETERSBURG TIMES, Dec. 3, 2004, at 2A.

¹¹² *Id.* The proceedings were suspended when the Denver Post appealed the closure of the hearings; in February 2005 an Army court of appeals ordered the Army to reopen the hearings and release transcripts from the December 2004 session. Dick Foster, *Soldiers' Hearing Reopened: Closure "Unlawful," Army Court Rules*, ROCKY MTN. NEWS (Denver), Feb. 24, 2005, at 26A.

¹¹³ Gibson, *supra* note 69.

¹¹⁴ *Id.*

¹¹⁵ Editorial, *Military Ignores Justice Again*, DENV. POST, Aug. 24, 2004, at B6; Miles Moffeit & Arthur Kane, *Iraq GIs Allowed to Avoid Trial*, DENV. POST, Aug. 22, 2004, at A1. Soldiers discharged in lieu of trial usually receive a service characterization of under other than honorable conditions. Also, in September 2003 a soldier had shot and killed a prisoner who was throwing rocks; it is unclear whether the soldier, who was demoted and allowed to leave the service rather than face court-martial, is the same one referred to in the Denver Post article. See Steven Lee Myers, *Why Military Justice Can Seem Unjust*, N.Y. TIMES, June 6, 2004, at D3.

¹¹⁶ *Nation in Brief*, WASH. POST, Mar. 15, 2005, at A24; Robert Weller, *Officer Denies Abusing Citizens of Iraqi Town*, ARMY TIMES, Mar. 16, 2005, available at <http://www.armytimes.com> (last visited Mar. 17, 2005).

¹¹⁷ Weller, *supra* note 116.

¹¹⁸ *Id.*

¹¹⁹ Erin Emery, *Officer Sentenced to Prison: Convicted Army Captain Gets 45 Days, Cut in Salary*, DENV. POST, Mar. 18, 2005, at B5.

Specialist Brent W. May, along with co-accused SGT Michael P. **Williams** (see below), is accused of fatally shooting an Iraqi man in his home during house-to-house searches on August 28, 2004, and attempting to cover up the crime.¹²⁰ After soldiers found a revolver and AK-47 in the man's house, SGT Williams brought the Iraqi and SPC May inside while the man's family remained outside.¹²¹ After a brief exchange between the two soldiers, SPC May shot the man twice in the head.¹²² Specialist May claimed that SGT Williams ordered him to shoot the Iraqi.¹²³ Specialist May is in pretrial confinement and could face the death penalty if the charges are referred to trial as a capital case.¹²⁴

Captain Rogelio Maynulet was charged with murder and dereliction of duty for shooting an Iraqi on May 21, 2004.¹²⁵ At the Article 32 pretrial hearing, witnesses testified that the man was badly wounded and missing part of his skull after a firefight and that CPT Maynulet told a fellow officer that he shot the man out of compassion.¹²⁶ After the pretrial hearing, the division commander decided not to go forward with the murder charge and instead referred the charge to trial as assault with intent to commit murder.¹²⁷ At the court-martial that began in late March 2005, CPT Maynulet was convicted of the lesser offense of assault with intent to commit voluntary manslaughter; facing a maximum of ten years of imprisonment, he was sentenced to a dismissal from the U.S. Army.¹²⁸

Staff Sergeant Scott McKenzie received nonjudicial punishment for dereliction of duty, maltreatment of detainees, and making false statements to investigators.¹²⁹ He was found guilty of holding down a detainee while fellow soldiers inflicted kicks and for holding a detainee's legs apart while encouraging others (who were kicking the detainee in the abdomen and head) to kick the man in the groin.¹³⁰ After receiving punishment that

¹²⁰ Edmund Sanders, *Troops' Murder Cases in Iraq Detailed*, L.A. TIMES, Dec. 7, 2004, at A1.

¹²¹ *Id.*

¹²² *Id.* Staff Sergeant Williams allegedly told SPC May, "You know what to do" to which SPC May replied by asking excitedly, "Can I shoot this one?" *Id.*; Edmund Sanders, David Zucchino & Stephanie Simon, *The Conflict in Iraq: Killings Sting Proud Battalion*, L.A. TIMES, Dec. 13, 2004, at A1; Karl Vick, *Two Days in August Haunt Charlie Company*, WASH. POST, Dec. 14, 2004, at A1. Compare these and other allegations involving U.S. soldiers killing civilians with summaries findings of guilt for grave breaches of the Geneva Conventions, including the war crime of murder, in HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 113-19 (2004), available at <http://www.hrw.org>.

¹²³ Sanders, *supra* note 120. SPC May allegedly took a digital photo of the victim and labeled the file "evidence" on his personal computer. *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, L.A. TIMES, Sept. 23, 2004, at A7.

¹²⁴ Sanders, *supra* note 120.

¹²⁵ *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 123. The man was reportedly the driver for the militant Shiite cleric Muqtada al-Sadr. Editorial, *A Slippery Slope We'd Best Avoid*, CHI. SUN-TIMES, Dec. 9, 2004, at 35.

¹²⁶ *Charges Reduced in Iraq Killings: A Captain Will Stand Court-Martial on Counts of Dereliction of Duty Instead of Murder in What Was Called "A Mercy Killing"*, L.A. TIMES, Dec. 8, 2004, at A3.

¹²⁷ *Id.*

¹²⁸ *U.S. Soldier Avoids Jail in Killing*, WASH. POST, Apr. 2, 2005, at A15. A dismissal is a punitive discharge of a commissioned officer and imposable only through trial by court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8)(A) (2002).

¹²⁹ *Troops Discharged for Beating Iraqis*, *supra* note 32.

¹³⁰ *Id.*

consisted of 30 days of extra duty, 30 days restriction to the base, forfeiture of pay, and reduction to E-1, SSG McKenzie was administratively separated from the Army with an honorable discharge.¹³¹ (See related entries for **Canjar**, **Edmondson**, and **Girman**.)

Major Gregory McMillion, an Air Force maintenance officer, was convicted of illegally shipping to the United States hundreds of items from Iraq, including six rocket-propelled grenade launchers, eight uniforms, more than 1,000 Iraqi military berets, around 30 automatic rifles, and a statue looted from a museum.¹³² He was sentenced to one year of confinement and a dismissal.¹³³

Lance Corporal Konstantin Mikholap was among eight Marines charged in connection with allegations of detainee abuse at a detention facility near Nasiriyah, Iraq, at which one detainee died in June 2003.¹³⁴ Two specifications of assault and one specification of making a false statement were referred to a special court-martial on October 1, 2003.¹³⁵ (See related entries for **Froeder**, **Hernandez**, **Paulus**, **Pittman**, **Rodney**, **Rodriguez-Martinez**, **Roy**, and **Vickers**.)

Specialist Anthony M. Morden has been charged with assault and other crimes related to detainee abuse at Bagram, Afghanistan.¹³⁶ (See related entries for **Boland** and **Cammack**.)

By the fall of 2004, seven **Navy SEALs** were investigated for abusing Iraqi prisoners.¹³⁷ One SEAL was tried in October 2004 and acquitted of abuse charges, and the charges for two other SEALs were set for pre-trial hearings.¹³⁸ One of the two SEALs, a medical corpsman, was accused of dereliction of duty and assault, to include pointing a loaded firearm at a prisoner.¹³⁹ In exchange for the corpsman's admission of wrongdoing and testimony against another SEAL, the charges against him were disposed of in a lesser forum.¹⁴⁰ Charges against the other Navy SEAL, a boatswain's mate first, were referred to a court-martial in November 2004 on charges of dereliction of duty, maltreatment, making a false official statement, and assault for the beating of an Iraqi (Al-Jamadi) who later died at Abu Ghraib

¹³¹ *Id.* It is unclear from the article whether SSG McKenzie was discharged honorably or under honorable conditions (a general discharge).

¹³² *Nation in Brief*, WASH. POST, May 21, 2005, at A20.

¹³³ *Id.*

¹³⁴ *Marines Press Charges Against Eight over the Death of an Iraqi Prisoner*, N.Y. TIMES, Oct. 19, 2003, at 20.

¹³⁵ Jonathan Heller, *Eight Marine Reservists Charged in Beating Death of Iraqi POW*, SAN DIEGO UNION-TRIB., Oct. 19, 2003, at A2; Tony Perry, *Marines Charged in Death of Captive*, L.A. TIMES, Oct. 19, 2003, at B1.

¹³⁶ Golden, *supra* note 29. Specialist Morden is also likely charged with connection with the death of one of the Afghan detainees at Bagram. *See id.*

¹³⁷ Tony Perry, *A Navy SEAL Is Cleared of Abuse Charges*, L.A. TIMES, Oct. 28, 2004, at A3.

¹³⁸ *Id.*

¹³⁹ *Id.* The SEAL admitted that he posed for a picture while holding the loaded gun to a hooded prisoner's head. Alex Roth, *SEAL Takes Stand in Abuse Hearing: Corpsman Testifies Prisoner Was Beaten*, SAN DIEGO UNION-TRIB., Oct. 30, 2004, at B1.

¹⁴⁰ The corpsman received a one-grade rank reduction, forfeiture of one-half of his pay for two months, 45 days of restriction to his base, and 45 days of extra duty. Roth, *supra* note 139. Based on the punishment imposed, the corpsman received nonjudicial punishment. Unlike courts-martial, results of nonjudicial punishment are not usually released. The Navy has not released the names of the SEALs.

prison.¹⁴¹ Mr. Al-Jamadi reportedly was subjected to a “Palestinian hanging” in which his hands were cuffed behind him and he was suspended from his wrists.¹⁴² The boatswain’s mate is accused of beating several prisoners and encouraging another SEAL to strike a detainee.¹⁴³ By January 11, 2005, a Navy SEAL, Lieutenant Andrew **Ledford**, had been charged with assault, maltreatment, and conduct unbecoming an officer for his treatment of detainees.¹⁴⁴ One October 2004 report indicated that some of the remaining three members may face charges of aggravated assault with intent to cause death,¹⁴⁵ but another media report indicated that, as of mid-February 2005, eight Navy personnel received nonjudicial punishment while two yet await further action.¹⁴⁶

First Lieutenant (1LT) Glenn A. Niles Jr. pleaded guilty to conduct unbecoming an officer after striking three Iraqi prisoners on July 30, 2003, following their failed escape attempt.¹⁴⁷ Under a plea agreement, three counts of mistreatment of prisoners were dropped; on July 1, 2004, 1LT Niles was fined more than \$12,000 and reprimanded.¹⁴⁸

Second Lieutenant Ilario Pantano, a veteran from the first Gulf War, faces charges of premeditated murder of two unarmed Iraqi men on April 15, 2004.¹⁴⁹ The incident began when the unit fired upon a sedan speeding away from an insurgent hideout and disabled the car.¹⁵⁰ The two men in the car were initially handcuffed, but 2LT Pantano had the cuffs removed and ordered the men to remove the seats of the car to check for weapons.¹⁵¹ Second Lieutenant Pantano maintains that he shot the men in self-defense after they pivoted toward him.¹⁵² A sergeant from the platoon claimed that after the lieutenant shot two men in the back, he placed a sign above the men’s bodies with the division’s motto, “No better friend, no worse enemy.”¹⁵³ Following a pretrial hearing in late April 2005,¹⁵⁴ the investigating

¹⁴¹ Rick Rogers, *Navy Seal to Face Trial in Iraqi’s Death*, SAN DIEGO UNION-TRIB., Nov. 18, 2004, at B3. The investigating officer had recommended that the boatswain’s mate first receive nonjudicial punishment. *Id.*

¹⁴² R. Jeffrey Smith, *Army Files Cite Abuse of Afghans: Special Forces Unit Prompted Senior Officers’ Complaints*, WASH. POST, Feb. 18, 2005, at A16. An Army sergeant and prison guard told investigators that Mr. Al-Jamadi’s arms were so badly stretched that he was surprised the man’s arms “didn’t pop out of their sockets.” *Id.* The sergeant also reported that, as Al-Jamadi was lowered from the hanging position, blood ran from his mouth “as if a faucet had been turned on.” Conor O’Clery, *New Prisoner Abuse Claims*, IRISH TIMES, Feb. 19, 2005, at 11. Compare these allegations with the finding of torture as recognized in common Article 3 of the Geneva Conventions in *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, (Int’l Crim. Trib. Yugoslavia, Trial Chamber, Dec. 10, 1998).

¹⁴³ Roth, *supra* note 139.

¹⁴⁴ Ned Parker, *Iraqi P.M. Defiant Amid New Bloodshed*, ADVERTISER (Queensland), Jan. 12, 2005, at 31.

¹⁴⁵ Perry, *supra* note 137.

¹⁴⁶ Smith, *supra* note 142. A May 2005 newspaper report indicates that nine members of the platoon have received nonjudicial punishment. *See* Reid, *supra* note 107.

¹⁴⁷ Steve Liewer, *MP Reprimanded in Iraqi Prison Abuse Trial*, STARS & STRIPES, July 3, 2004, available at <http://www.estripes.com> (last visited May 12, 2005).

¹⁴⁸ *Id.*

¹⁴⁹ Brian Kates, *Warrior Faces Toughest Battle: Hero Leatherneck Facing Charges He Killed Two Iraqis*, N.Y. DAILY NEWS, Mar. 6, 2005, at 28.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

officer found the shooting justified, recommended that the criminal charges be dropped, and suggested that 2LT Pantano receive nonjudicial punishment for lesser charges.¹⁵⁵

Colonel (COL) Thomas Pappas, commander of the 205th Military Intelligence Brigade, was administratively reprimanded for problems related to the prisoner abuse scandal at Abu Ghraib.¹⁵⁶ In May 2005 the Army disclosed that COL Pappas waived his right to trial by court-martial and accepted nonjudicial punishment on two counts of dereliction of duty for failing to adequately inform, train, and supervise subordinates on the application of proper interrogation techniques and for failing to obtain prior approval before allowing military working dogs to be present during detainee interrogations.¹⁵⁷ His punishment consisted of forfeitures of a half of his pay for two months and an official reprimand.¹⁵⁸ Unlike the other officers, COL Pappas was not initially relieved of his command.¹⁵⁹ (See similar entries for **Jordan, Karpinski, Phillabaum, and Reese.**)

Major Clarke Paulus was originally charged with negligent homicide in the June 2003 death of a 52-year-old Ba'athist who had been handcuffed, beaten, and left for hours in the sun despite experiencing difficulty in breathing and diarrhea.¹⁶⁰ One of eight Marines facing charges in the detainee's death,¹⁶¹ MAJ Paulus was acquitted of assault and battery but found guilty of dereliction of duty and of maltreatment of prisoners for not stopping the abuse by his subordinates.¹⁶² He was punished with dismissal from the Marine Corps,¹⁶³ which is the officer's equivalent of a dishonorable discharge. (See related entries for **Froeder, Hernandez, Mikhola, Pittman, Rodney, Rodriguez-Martinez, Roy, and Vickers.**)

Sergeant First Class Tracy Perkins was court-martialed in January 2005 for forcing two Iraqis to jump from a bridge into the Tigris River in January 2004 and for the resulting death of one of the men.¹⁶⁴ He was convicted of obstruction of justice, assault consummated by a battery, and two specifications of aggravated assault, but he was acquitted of involuntary manslaughter and making a false official statement.¹⁶⁵ The sentence included six months of

¹⁵⁴ Brian Kates, *Stunner at Iraq Hearing*, N.Y. DAILY NEWS, Apr. 28, 2005, at 14. The investigating officer interrupted the proceedings to advise the main prosecution witness of his right against self-incrimination after defense counsel elicited testimony from the witness about failing to obey orders not to talk to the press. *Id.*

¹⁵⁵ *Marine's Shooting of Iraqis Justified, Probe Concludes*, WASH. POST, May 15, 2005, at A24.

¹⁵⁶ See Gonzalez, *supra* note 100.

¹⁵⁷ Jeffrey Smith, *Abu Ghraib Officer Gets Reprimand: Non-Court-Martial Punishment for Dereliction of Duty Includes Fine*, WASH. POST, May 12, 2005, at A16.

¹⁵⁸ *Id.*

¹⁵⁹ Gonzalez, *supra* note 100.

¹⁶⁰ Baxter, *supra* note 10.

¹⁶¹ Gibson, *supra* note 69. The charges against six other Marines, including Major Michael Froeder, were dismissed. Rick Rogers, *Main Charge Is Reduced in Court-Martial: Assault and Battery Count Could Net Officer 21 Months*, SAN DIEGO UNION-TRIB., Nov. 6, 2004, at B2.

¹⁶² *Camp Pendleton: Major Convicted in Iraqi Prisoner Abuse*, L.A. TIMES, Nov. 11, 2004, at B10. For a summary of Major Paulus's testimony at trial, see David Hasemyer, *Officer Says Harm to Iraqi Prisoner Was Unintentional: Marine Ordered the Man Dragged from Cell by Neck*, SAN DIEGO UNION-TRIB., Nov. 9, 2004, at B1.

¹⁶³ *Camp Pendleton: Major Convicted in Iraqi Prisoner Abuse*, *supra* note 162.

¹⁶⁴ Goldenberg, *supra* note 87.

¹⁶⁵ *GI Sentenced to Six Months in Iraq Drowning Case*, CHI. TRIB., Jan. 9, 2005, at 18.

confinement and a one-grade reduction to the rank of staff sergeant.¹⁶⁶ (See related entries for **Cunningham, Gwinner, Sassaman, and Saville.**)

Lieutenant Colonel Jerry L. Phillabaum, 320th Military Police Battalion commander, was reprimanded and relieved of his command for problems at Abu Ghraib prison in Iraq.¹⁶⁷ (See related entries for **Jordan, Karpinski, Pappas, and Reese.**)

Sergeant Gary Pittman, a Marine reservist who worked as a prison guard in New York, was accused of kicking, kneeling, and beating prisoners in Iraq in 2003, including one 52-year-old Iraqi man was found dead.¹⁶⁸ Facing charges of assault and dereliction of duty, SGT Pittman faced a maximum confinement of two years.¹⁶⁹ Sergeant Pittman was convicted in early September 2004 of a majority of the charges and was sentenced to 60 days of hard labor and a reduction to E-1.¹⁷⁰ (See related entries for **Froeder, Hernandez, Mikholap, Paulus, Rodney, Rodriguez-Martinez, Roy, and Vickers.**)

Captain Donald J. Reese, the commander of the 372th Military Police Company that was tasked to guard prisoners at Abu Ghraib in Iraq, was relieved of his command and reprimanded for failing to supervise his soldiers and for failing to enforce the Geneva Conventions.¹⁷¹ (See similar entries for **Jordan, Karpinski, Pappas, and Phillabaum.**)

Private First Class Edward L. Richmond Jr. was charged with shooting an Iraqi handcuffed arrestee in the head during a roundup of suspected insurgents on February 28, 2004.¹⁷² At trial PFC Richmond testified that he fired after he thought the man lunged at another soldier and said that he did not know the man's hands were secured.¹⁷³ Convicted of voluntary manslaughter, the soldier was sentenced to three years of confinement and a dishonorable discharge.¹⁷⁴

Lance Corporal Andrew Rodney was among eight Marines charged in connection with maltreatment of detainees at a detention facility near Nasiriyah, Iraq, at which one detainee died in June 2003.¹⁷⁵ One charge of assault was referred to trial by special court-martial on October 1, 2003.¹⁷⁶ (See related entries for **Froeder, Hernandez, Mikholap, Paulus, Pittman, Rodriguez-Martinez, Roy, and Vickers.**)

¹⁶⁶ Goldenberg, *supra* note 87; John W. Gonzalez, *Five More Who Served in Iraq Have Fort Hood Court Dates*, HOUSTON CHRON., Jan. 16, 2005, at A6.

¹⁶⁷ Gonzalez, *supra* note 100.

¹⁶⁸ McDonald, *supra* note 66.

¹⁶⁹ *Id.* Sergeant Pittman was acquitted of the assault against the Iraqi man who was later found dead; with the acquittal on that count, the possible maximum confinement fell to six months. Tony Perry, *Marine Sentenced For Beating Iraqi Captives*, L.A. TIMES, Sept. 4, 2004, at B8.

¹⁷⁰ Tony Perry, *The State: Officer's Trial in Abuse of Iraqi Inmate Is Delayed*, L.A. TIMES, Sept. 17, 2004, at B8.

¹⁷¹ Gonzalez, *supra* note 100.

¹⁷² Jason Chudy, *GI Faces Court-Martial in Death of Suspected Insurgent*, STARS & STRIPES, Aug. 1, 2004, available at <http://www.estripes.com> (last visited May 12, 2005).

¹⁷³ *Iraq Digest*, SEATTLE TIMES, Aug. 8, 2004, at A7.

¹⁷⁴ *Id.*

¹⁷⁵ *Marines Press Charges Against Eight over the Death of an Iraqi Prisoner*, *supra* note 134.

¹⁷⁶ Heller, *supra* note 135; Perry, *supra* note 135.

Sergeant Albert Rodriguez-Martinez was among eight Marines charged in connection with maltreatment of detainees at a detention facility near Nasiriyah, Iraq, at which one detainee died in June 2003.¹⁷⁷ He faced two specifications of assault and one specification of making a false statement; the charged were referred to a special court-martial on October 1, 2003.¹⁷⁸ (See related entries for **Froeder, Hernandez, Mikholap, Paulus, Pittman, Rodney, Roy, and Vickers.**)

Private First Class William Roy avoided prosecution for his involvement in the death of a 52-year-old Iraqi prisoner in exchange for his testimony against SGT Gary **Pittman**.¹⁷⁹ At SGT Pittman's trial, PFC Roy admitted to kicking the prisoner in the foot and shins and described how SGT Pittman kicked and hit the man in the chest.¹⁸⁰ (See related entries for **Froeder, Hernandez, Mikholap, Paulus, Pittman, Rodney, Rodriguez-Martinez, and Vickers.**)

Sergeant Selena M. Salcedo faces charges of assaulting an Afghan detainee, dereliction of duty, and lying to investigators.¹⁸¹ A former interrogator at Bagram, Afghanistan, SGT Salcedo is suspected of stepping on the detainee's bare foot, grabbing his beard, kicking him, and then ordering the detainee to remain chained to the ceiling.¹⁸² The detainee later died of heart failure caused by "blunt force injuries" to his lower legs.¹⁸³ (See related entries for **Brand and Walls.**)

Lieutenant Colonel Nathan Sassaman received nonjudicial punishment for ordering the cover-up of a January 2004 death of an Iraqi.¹⁸⁴ For details, see the entries for **Cunningham, Gwinner, Perkins, and Saville.**

First Lieutenant Jack Saville faced charges of manslaughter, aggravated assault, conspiracy, making false statements and obstruction of justice.¹⁸⁵ On March 15, 2005, 1LT Saville pleaded guilty to two assault charges and one charge each of dereliction of duty and obstruction of justice for his role of forcing two men into the Tigris River in January 2004.¹⁸⁶ After a brief trial, he was also found guilty of battery based on a separate incident that took place in Balad, Iraq, in December 2003; the manslaughter charge was not strongly prosecuted and resulted in a not guilty finding.¹⁸⁷ Although the charges could have carried a maximum punishment of more than nine years, a plea agreement capped his potential confinement at 15 months.¹⁸⁸ The military judge sentenced 1LT Saville to 45 days of

¹⁷⁷ *Marines Press Charges Against Eight over the Death of an Iraqi Prisoner*, *supra* note 134.

¹⁷⁸ Heller, *supra* note 135; Perry, *supra* note 135.

¹⁷⁹ Michelle Caruso & Corky Siemaszko, *I Also Kicked Prisoner—G.I.*, N.Y. DAILY NEWS, Aug. 26, 2004, at 38.

¹⁸⁰ *Id.*

¹⁸¹ Golden, *supra* note 29.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Army Punishes Commanders in Drowning of Iraqi Civilian*, *supra* note 40. Goldenberg, *supra* note 87.

¹⁸⁵ Erin Emery & Arthur Kane, *Former Carson GI Faces Murder Charge: The Soldier Is the Seventh from the Colorado Base to Be Charged in Connection with Iraqis' Deaths*, DENV. POST, Nov. 25, 2004, at A1.

¹⁸⁶ *Platoon Leader Pleads Guilty in Assault Case*, L.A. TIMES, Mar. 15, 2005, at A16.

¹⁸⁷ Gonzalez, *supra* note 39.

¹⁸⁸ *Id.*

confinement and a forfeiture of approximately two-thirds of his pay for six months.¹⁸⁹ (See the related entries for **Cunningham, Gwinner, Perkins** and **Sassaman**.)

Specialist Jeremy C. Sivits pleaded guilty in May 2004 to charges that he took pictures of detainees at Abu Ghraib prison in Iraq, including the infamous pictures of a pile of naked and hooded detainees, and failed to stop prisoners from being punched and stomped by fellow soldiers.¹⁹⁰ The plea was part of a pretrial agreement in which SPC Sivits pleaded guilty to abusing detainees and agreed to testify against fellow soldiers in exchange for referral of his case to a special court-martial.¹⁹¹ He was sentenced to one year in prison (the maximum amount of confinement allowed in a special court-martial), reduction to E-1, and a bad-conduct discharge.¹⁹² (See related entries for **Ambuhl, Cruz, Davis, England, Frederick, Graner**, and **Harman**, and **Krol**.)

Sergeant First Class William Sommer was charged with murder and dereliction of duty relating to the suffocation of an Iraqi general during an interrogation in November 2003.¹⁹³ Following pretrial hearings held in December 2004 and March 2005, the investigation officer recommended dropping all charges against SFC Sommer and further recommended that SFC Sommer instead receive a reprimand for failing to protect the general.¹⁹⁴ (See entries for **Loper, Welshofer, Voss**, and **Williams** [Jefferson]).

Private First Class Andrew J. Sting was among a group of four Marines who, in April 2004, shocked an Iraqi prisoner with wires from a 110-volt electric transformer.¹⁹⁵ After pleading guilty on May 14, 2004 to charges of assault, cruelty and maltreatment, dereliction of duty, and conspiracy to commit assault, PFC Sting was sentenced to one year in confinement, reduction to E-1, and a bad-conduct discharge.¹⁹⁶ (See related entries for **Gabbey, Trefney**, and **Travis**.)

Sergeant Matthew K. Travis pleaded guilty to dereliction of duty and cruelty and maltreatment of prisoners for his involvement in intentionally subjecting an Iraqi prisoner to electric shocks in April 2004.¹⁹⁷ He was sentenced in September 2004 to fifteen months of confinement, reduction to E-1, and a bad-conduct discharge.¹⁹⁸ (See related entries for **Gabbey, Sting**, and **Trefney**.)

¹⁸⁹ *Id.*; *Platoon Leader Pleads Guilty in Assault Case*, *supra* note 186.

¹⁹⁰ Helen Kennedy, *G.I. Sentenced to Year in Jail Abuse Scandal*, N.Y. DAILY NEWS, May 20, 2004, at 10.

¹⁹¹ Garald D. Skoning, *Torture Cases Test Military Justice*, CHI. TRIB., May 23, 2004, at 9; Kennedy, *supra* note 190. The charge sheet is available at <http://news.findlaw.com/hdocs/docs/iraq/sivits50504chrg.html> (last visited May 12, 2005).

¹⁹² Onishi, *supra* note 37.

¹⁹³ *January 30 Election Won't Be Delayed*, *supra* note 111.

¹⁹⁴ Arthur Kane, *Lesser Charges Urged in Death of Iraqi: For One Soldier No Counts Sought*, DENV. POST, May 11, 2005, at B3.

¹⁹⁵ Chan, *supra* note 68.

¹⁹⁶ *Id.*; Sewell Chan, *Two Marines Guilty of Abusing Prisoner*, WASH. POST, June 4, 2004, at A18.

¹⁹⁷ Perry, *supra* note 169.

¹⁹⁸ *Id.*

Private First Class Jeremiah J. Trefney was one of four Marines who, in April 2004, subjected an Iraqi prisoner to shocks from a 110-volt electric transformer.¹⁹⁹ After pleading guilty on May 14, 2004 to charges of cruelty and maltreatment, dereliction of duty, making a false official statement, violating a lawful order, and conspiracy to commit assault, PFC Trefney was sentenced to eight months in confinement, reduction to E-1, and a bad-conduct discharge.²⁰⁰ (See related entries for **Gabbey**, **Sting**, and **Travis**.)

Major William Vickers, a Marine Corps reservist, was charged with one specification of willful dereliction of duty for failing to prevent his men from mistreating Iraqi prisoners at a small detention facility near Nasiriyah in the spring of 2003.²⁰¹ The charge stemmed from reports of forcing detainees to stand in the heat for 50 minutes out of every hour, handcuffing detainees awaiting interrogations, and allowing bags to be placed over their heads.²⁰² Although he was no longer the commander of the facility in June 2003 when a high-ranking Ba'ath official died, MAJ Vickers was alleged to have trained or failed to properly supervise the guards who took part in the later abuse; his defense counsel had stated that MAJ Vickers received no training on how to run a detention facility.²⁰³ His charges were dismissed in April 2004.²⁰⁴ (See related entries for **Froeder**, **Hernandez**, **Mikholap**, **Paulus**, **Pittman**, **Rodney**, **Rodriguez-Martinez**, **Roy**, and **Vickers**.)

Major Jessica Voss, who headed the 66th Military Intelligence Unit, received a reprimand following the November 2003 death of an Iraqi general at the hands of U.S. soldiers under her supervision.²⁰⁵ (See entries for **Loper**, **Sommer**, **Welshofer**, and **Williams** [Jefferson]).

Specialist Glendale C. Walls II was charged in early May 2005 with assault, maltreatment of a detainee, and failure to obey a lawful order.²⁰⁶ The charges stemmed from allegations of using abusive interrogation techniques at Bagram, Afghanistan.²⁰⁷ One of the detainees interrogated by SPC Walls in December 2002 died a short time later at the detention facility.²⁰⁸

Chief Warrant Officer Lewis Welshofer Jr. was charged with murder and dereliction of duty relating to the suffocation of an Iraqi general during an interrogation in November 2003.²⁰⁹ He is accused of sitting on the general's chest while covering the man's mouth.²¹⁰ Testimony revealed that he put claustrophobic detainees in wall lockers to interrogate

¹⁹⁹ Chan, *supra* note 68. .

²⁰⁰ *Id.*; Chan, *supra* note 196.

²⁰¹ Rick Rogers, *Case Opens in Treatment of Iraqis: Marine Major First to Face Charges Over Prisoners*, SAN DIEGO UNION-TRIB., Dec. 18, 2003, at B1.

²⁰² *Id.*

²⁰³ Daniel Evans, *Defender: Marine Did Best Job He Could in Iraq: Closing Arguments Heard in POW Case*, SAN DIEGO UNION-TRIB., Dec. 20, 2003, at B10.

²⁰⁴ Rogers, *supra* note 90.

²⁰⁵ Arthur Kane, *Witness Says Brass Complicit in Abuse*, DENV. POST, Mar. 31, 2005, at A1.

²⁰⁶ Golden, *supra* note 29.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *January 30 Election Won't Be Delayed*, *supra* note 111.

²¹⁰ Kane, *supra* note 205.

them.²¹¹ Chief Warrant Officer Welshofer previously received a letter of reprimand for the incident.²¹² Pretrial hearings were held in December 2004 and March 2005 to determine whether he will face trial by court-martial.²¹³ (See entries for **Loper, Sommer, Voss, and Williams** [Jefferson]).

Staff Sergeant Shane A. Werst faces charges of premeditated murder for shooting an Iraqi civilian in his home during a series of house raids on January 3, 2004.²¹⁴ A fellow squad member reported that rather than handcuffing the Iraqi, who was possibly a suspected insurgent, and calling for a transport, SSG Werst separated the man from his family and took him to a back room where the man was beaten with a flashlight.²¹⁵ Staff Sergeant Werst then ordered a squad member to help the Iraqi off the ground and then shot the man.²¹⁶ Another soldier stated that SSG Werst placed a gun on the man's body to make it appear that he (SSG Werst) acted in self-defense.²¹⁷ Shortly before firing his M16 at the Iraqi at close range, SSG Werst allegedly said, "We're going to shoot this (expletive)[.]"²¹⁸ He also faces a charge of obstruction of justice for attempting to impede an investigation and influence a witness.²¹⁹ Following a withdrawal from a plea agreement, SSG Werst entered pleas of not guilty; a court-martial was scheduled to begin May 23, 2005.²²⁰

Lieutenant Colonel Allen B. West, the most senior American officer to be charged with direct prisoner abuse,²²¹ faced potential charges of excessive use of force against an Iraqi in August 2003.²²² Lieutenant Colonel West dragged an uncooperative detainee, who was an Iraqi policeman suspected of planning attacks against U.S. forces, outside to an area used for clearing weapons, gave the man a count to five to start cooperating, then fired two shots near the detainee's head.²²³ He also allowed soldiers from his unit to beat the detainee.²²⁴ Lieutenant Colonel West was relieved of his command and, after a pretrial hearing under Article 32 of the UCMJ, the commanding general disposed of the charges through nonjudicial punishment instead of referring them to trial by court-martial.²²⁵

²¹¹ *Id.*

²¹² *Id.*

²¹³ *January 30 Election Won't Be Delayed*, *supra* note 111; Kane, *supra* note 205.

²¹⁴ John W. Gonzalez, *Prosecutors Say Soldier Should Be Tried in Shooting, Squad Leader Would Be Charged in Iraqi's Death: No Decision Made on Court-Martial*, HOUSTON CHRON., Jan. 22, 2005, at A15.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Soldier Faces Trial in Iraqi Man's Death*, N.Y. TIMES, Feb. 25, 2005, at A9.

²¹⁸ Gonzalez, *supra* note 214.

²¹⁹ Emery & Kane, *supra* note 185.

²²⁰ John W. Gonzalez, *Soldier Asks for Military Trial in Death of Iraqi Civilian: Much-Decorated Soldier Rejects Plea Agreement*, HOUSTON CHRON., Apr. 27, 2005, at A10. At the time of this print, trial proceedings were still ongoing.

²²¹ Richard Beeston, *U.S. Officer Admits Role in Mock Execution*, TIMES (London), Nov. 20, 2003, at 22.

²²² *Report: West Will Not Face Court-Martial*, STARS & STRIPES, Dec. 14, 2003, available at <http://www.estripes.com> (last visited May 12, 2005); Beeston, *supra* note 221.

²²³ *Report: West Will Not Face Court-Martial*, *supra* note 222; Beeston, *supra* note 221.

²²⁴ Beeston, *supra* note 221.

²²⁵ *Report: West Will Not Face Court-Martial*, *supra* note 222. According to documents obtained by the ACLU, four enlisted soldiers received nonjudicial punishment for their role in the interrogation, three of whom were punished with a rank reduction and forfeitures of pay. U.S. Army Crim. Invest. Cmd., Report of Investigation – Final 3 (Feb. 6, 2004) (unpublished report no. 0512-03-CID469-60212-5C1A/5C2/5T1, available at http://www.aclu.org/torturefoia/released/105_167.pdf last visited May 12, 2005).

Sergeant First Class James H. Williams was convicted on July 29, 2004, of armed robbery for stealing an Iraqi SUV.²²⁶ The court-martial panel rejected the defense argument that SFC Williams commandeered the vehicle for the war effort and imposed a sentence that included a bad-conduct discharge and a reduction to E-1.²²⁷

Staff Sergeant Michael P. Williams faces multiple charges of premeditated murder for killing three Iraqis, as well as charges of obstruction of justice and making a false official statement.²²⁸ On August 18, 2004, SSG Williams fired on a man running from a dump truck that the unit believed was carrying insurgents (see entries for **Alban-Cardenas**, **Anderson**, and **Horne**).²²⁹ Another member of SSG Williams' unit said that he saw the man waving a white flag and heard him shouting, "Baby! Baby!"²³⁰ On August 28, 2004, SSG Williams was involved in the shooting deaths of two Iraqi men, the first of which is described under the entry for SPC **May**. In the second August 28 incident, after soldiers discovered an AK-47 during a house search, SSG Williams ordered the soldiers to bring the Iraqi, who had been kept outside on his knees in plastic handcuffs, inside the house.²³¹ Next, SSG Williams allegedly cut the handcuffs off, laid the weapon near the man, said aloud to the other soldiers that he felt threatened, and shot the Iraqi.²³² After another soldier said that the man was still alive, and SSG Williams shot the Iraqi a second time.²³³ Later, prosecutors alleged that SSG Williams ordered his troops to "stick to the story" that the Iraqis had reached for their guns before being shot.²³⁴

Chief Warrant Officer (WO2) Jefferson L. Williams was charged with murder and dereliction of duty relating to the suffocation of an Iraqi general during an interrogation in November 2003.²³⁵ He previously received a reprimand for his involvement in the incident.²³⁶ On December 2, 2004, an initial closed pretrial hearing was held to determine

²²⁶ Michelle Boorstein, *Virginia Native Convicted of Stealing SUV in Iraq*, WASH. POST, July 30, 2004, at B5. For a discussion of varying viewpoints on the trial, see James Dao, *Two Views at Court-Martial on Seizing Iraqi Vehicle*, N.Y. TIMES, July 29, 2004, at A12.

²²⁷ Michelle Boorstein, *supra* note 226. Prosecutors called witnesses who testified that the accused and other soldiers tried to conceal the theft. *Id.* SFC Williams was also convicted of dereliction of duty for allowing his soldiers to consume alcohol in theater, which was prohibited by regulations. *Id.* At the time of his trial, SFC was two years shy of retirement eligibility; his bad-conduct discharge will make him ineligible for retirement and many veterans' benefits. *Id.*

²²⁸ *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 123.

²²⁹ Sanders, *supra* note 4. Another article refers to SSG Williams' order for another soldier to fire on an Iraqi standing in the street as the basis of the murder charge. *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 123.

²³⁰ Sanders, *supra* note 4.

²³¹ Sanders, *supra* note 120.

²³² *Id.* Before his squad left for Iraq, SSG Williams was reported to have told his unit that they would take no prisoners. Sanders et al., *supra* note 122. A soldier in SSG Williams' unit testified at a pretrial hearing that the accused talked about killing any Iraqi males of military age and any Iraqi found with a weapon. *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 123.

²³³ Sanders et al., *supra* note 122.

²³⁴ *Id.* Military authorities launched an investigation after a fellow soldier slipped a note about the killings to his superior officers; the soldier was then transferred out of the unit after SSG Williams threatened to kill him. *Id.*; *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 123.

²³⁵ *January 30 Election Won't Be Delayed*, *supra* note 111.

²³⁶ Kane, *supra* note 205.

whether he will face trial by court-martial.²³⁷ Following the resumption of open pretrial hearings in late March 2005, the investigating officer recommended that WO2 Williams face reduced charges of involuntary manslaughter and assault; he also recommended that WO2 Williams face an additional charge of assault for throwing a 20-pound box at the back of the general two days before he died.²³⁸ (See also entries for **Loper, Sommer, Voss, and Welshofer**).

Captain Carolyn Wood, one of 28 soldiers investigated in connection with detainee deaths at Bagram Air Base, Afghanistan, may yet face disciplinary action.²³⁹ An initial investigation found that CPT Wood, who oversaw interrogators at detention facilities in Abu Ghraib and Bagram, failed to implement appropriate safeguards to prevent detainee abuse and failed properly review interrogation plans that allowed for the improper use of isolation and nudity.²⁴⁰ Army investigators have recommended that CPT Wood be charged with conspiracy, maltreatment of detainees, and making a false official statement related to death of detainees at the facility she supervised.²⁴¹ (See related entries for **Boland, Brand, Cammack, Claus, Corsetti, Morden, Salcedo, and Walls**).

Specialist Tulafono Young was under investigation for shooting at a truck carrying passengers waving a white flag and for initially lying to investigators about the incident.²⁴² (See entries for **Horne and Williams [Michael]**.) Specialist Young asked his squad leader, SSG Michael Williams, what to do a man standing in the street; SSG Williams allegedly told the soldier to "light him up."²⁴³

Specialist Fabian Zamora was implicated the theft of money from an Iraqi bank while on guard duty in August 2003.²⁴⁴ (See entries for **Caldwell, Gentry, and Knight**.)

²³⁷ *January 30 Election Won't Be Delayed*, *supra* note 111.

²³⁸ Kane, *supra* note 194; Kane, *supra* note 205.

²³⁹ Jehl, *supra* note 23; see Golden, *supra* note 29.

²⁴⁰ Jehl, *supra* note 23.

²⁴¹ Elise Ackerman, *Soldier: Superiors OK'd Tactics: Charged in the Death of 2 Afghan Detainees, He Says 'Compliance Blows' Are Used Often*, *Houston Chron.*, Mar. 26, 2005, at A19.

²⁴² Sanders, *supra* note 120.

²⁴³ *The Conflict in Iraq: 2 U.S. Soldiers Face Charges in 3 Deaths*, *supra* note 123.

²⁴⁴ Inigo, *supra* note 27.